

The institutional functioning of the EU

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EU Law Foundations



The Institutional Functioning of the EU

2010-2011 Volume I

Maastricht Centre for European Law
Faculty of Law
Maastricht University

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The Jean Monnet grant enabled us first of all to invite a series of distinguished guest-speakers, who shared their knowledge, experiences and views on the institutional functioning with the students. The guest-speakers included *Prof. Frans Timmermans* (Member of Dutch Parliament and former Dutch Minister for European Affairs), *Hans De Grave* (Permanent Representation of the Netherlands to the European Union), *Prof. Damian Chalmers* (London School of Economics), *Kartika Liotard* (Member of the European Parliament, independent member in the European United Left) and *Frits Bolkestein* (former European Commissioner for the internal market, taxation and the customs union, former Member of Dutch Parliament (VVD) and former Dutch Minister of Foreign Trade and Defence). We thank the guest-speakers for their inspiring presentations, which have enriched both the students and the teaching staff. Special thanks go to Mr. Frits Bolkestein, who permitted us to include his contribution in this volume.

In addition, the Jean Monnet grant made it possible to organize a Student Conference, which was held on 9 December 2010. The Conference was opened by a keynote address delivered by *Prof. Vincenzo Salvatore* (Head of Legal Service of the European Medicines Agency and Professor of International Law at Università degli Studi dell'Insubria) and closed with an address by *Prof. Koen Lenaerts* (Judge at the EU Court of Justice and prof. of European Law, Leuven University, Belgium). Their illuminating and thought-provoking presentations were greatly appreciated. In between these keynote addresses each of the 160 students participating in the course was given the opportunity to either present a paper or act as a discussant of other students' papers in workshops composed of some 40 participants. The quality of the presentations and discussions, in which also staff members of our Faculty participated, was high and led to often lively and heated debates on issues involving the institutional functioning of the European Union. The sixteen best papers are collected in this special volume.

In addition to the above-mentioned guest-speakers, we are indebted to Adeline Bruyere, Florin Coman-Kund, Marc Dawson, Raluca Frunza, Maureen Geenen, Jonida Milaj, Elise Muir, Andrea Ott, Samira Sakhi, Lisa Waddington and Bruno De Witte for their various contributions. Last but not least, we would like to express our sincere gratitude to EACEA for the financial support received without which it would have been impossible to make the course as interesting and successful as it was.

Anne Pieter van der Mei and Ellen Vos

THE EUROPEAN UNION IS ON THE WRONG TRACK!

Frits Bolkestein

1. Introduction

The European Union is on the wrong track. Both the Netherlands and France voted in a referendum against what was labeled the European Constitution, which then morphed into the Lisbon Treaty after a few minor amendments. This Treaty states that the European Council (the group of government leaders) is to become an institution.

Behind this apparently innocuous name there is much more than one might think at first sight. Each European institution is in fact to have its own bureaucracy. The European Council currently has 20 officials: in ten years this will have jumped to 200. It will have its own building, which is already under construction. The Lisbon Treaty means a major shift of power in an inter-governmental direction. The result would have pleased President De Gaulle and Mrs. Thatcher. The Netherlands should never have agreed to this part of the treaty.

President of the European Council Herman van Rompuy has denied that the Treaty of Lisbon means a shift of power in an intergovernmental direction.¹ Yet in a recent speech in Berlin he defined the European Council's role as: "Defining the Union's strategic interests, deciding priorities, setting our common direction".² Hitherto it was the European Commission that had the monopoly of initiative. This no longer seems to be the case. In the same speech Mr. Van Rompuy has said that his Council will observe the economies of Member States, adding: "We will act and correct if necessary". This also used to be a competence of the European Commission.

The Heart of the European Union is the internal market, augmented by policies on competition, international trade. The Monetary Union later, when this had been established. Its difficulties form a crisis but not an existential one as some people seem to think. Should the Monetary Union be wounded up – which I don't think will happen – the EU will continue to exist. More about the EMU later.

2. The Internal Market

The internal market is the EU's most important achievement. It has been called 'an authentic miracle of free market liberalism'.³ It must at all cost be defended. When I left the European Commission in November 2004 I was sitting on a pile of 1500 infringement proceedings. Governments always want to do what is against the European Law. They do not like the competition which is essential to the internal market.

Of the four freedoms which make up the internal market, the freedom of movement of capital and goods is almost perfect. That of services unfortunately is not. That is a great pity because about

¹ See his address to the EPC breakfast policy briefing "Visions for Europe" (Brussels, 16 november 2010).

² Herman van Rompuy in an address to the Konrad-Adenauer- Stiftung, Pergamon Museum, Berlin, 9-11-2010

³ The Economist, 24-09-2009.

70% of our economics consist of services. According to Mario Monti the productivity of European services is 30% less than that of the American services industry. ⁴ This is because there is insufficient competition.

My objectives in proposing the services directive, which was unanimously adopted by the Commission in 2003, was to base the freedom of movement of services on the same '*Cassis de Dijon*' decision which governs the movement of goods. In essence this means country-of-origin-control.

The protests against the Services Directives started in Wallonia. The Parti Socialist which rules supreme there, wanted to attack the federal government in which it participated itself. It decided to use this Directive as battering ram. That is why the first mass meetings were organized in Brussels, from where they spilled over into France.

The opposition was quasi-unanimous there. In a way this was odd because France is a very important exporter of services. One would therefore have thought that France would be interested in a properly functioning internal market in that area. But no. The Polish Plumber became the bugbear who scared most Frenchmen into opposing the extra competition which the directive would bring. The European Parliament further emasculated the proposal.

According to some, the Polish Plumber even played a role in the French referendum on the so-called Constitution of Europe, which as is well known was negative. I doubt whether that is true.

3. *The Monetary Union*

The euro is experiencing difficult times. In itself the monetary union (EMU) is important for the Netherlands, as it ensures monetary stability within the Euro zone. But it can only function if the European Member States impose fiscal discipline on themselves. This discipline is laid down in the Stability and Growth Pact, which was solemnly in Dublin. Member States would strictly adhere to this Pact. But that is not what happened. If a solemn agreement, which would be strictly observed, is consigned to the scrapheap after a few years, one may well ask oneself whether there is any European declaration to which one may attach genuine credence.

The European Commission is the guardian of the treaties, it is sometimes said. But its former president Romano Prodi called the Stability Pact 'stupid'. When I distanced myself from that remark on Dutch television, he nearly sacked me. I was also the only European Commissioner who opposed the relaxation of the Pact under German and French pressure. The German, I said then, preach water but drink wine. Chancellor Angela Merkel has now apologized for the German stance at that time. This at any rate gives some hope for the future.

It is now proposed that Member States which infringe the Stability Pact should face sanctions. But these must be decided upon by national politicians and not be automatic, as the Germans wanted. So will they work? Sanctions are already part of the present treaty. But do we see Belgium voting against France or France against Italy?

I wish Greece all the best but do not see how that country can climb out of the hole it has dug for itself. This means that it will have to restructure its debts. Some people

⁴ The Economist, 10-7-2010.

believe that Greece should get out of the EMU so that it can devalue its currency. But that would place a huge upward pressure on its foreign debts. With restructuring the burden falls on other (particularly the German, French and Dutch banks).

The real scandal of course is not simply that the Greek government has lied about its statistics but that Greece joined the monetary union in the first place. This was made possible through a deal agreed between the Council of Ministers and the Commission.

As Herman van Rompuy has said, the euro has acted as a sleeping pill which allowed the Mediterranean countries in particular simply 'to let God's water flow over God's acres'. The difference in competitiveness between the Club Med countries and Germany has now risen to 30%. The Achilles heel of monetary union is that the 'one size fits all' philosophy does not work between countries with different economic cultures. The dividing line in Europe doesn't separate East from West, or the centre from the periphery, but North from South. That problem is not easy to solve.

Another way of putting the same problem is that the euro is a coin without a nation. According to some, the euro's difficulties can never be solved as long as national sovereignties are not pooled. But a federal Europe is not acceptable for most Member States. So the euro will continue its hazardous existence.

4. *Economic Governance*

This matter comes to the fore in the discussion on economic governance. France has always insisted on it. But what does it mean? As it is, there is the Stability-and-Growth Pact, even though it is at present inoperable, and there are the Broad Guidelines on Economic Policy (the GOPE in French). Do we need anything more? Is the French insistence on this point perhaps its wish to protect itself against fiscal competition? But we are taxed too heavily in Europe. Some competition here would be a good thing.

One sometimes has the impression that the French do not really like competition. If so, that aversion has deep roots. Rousseau opposed it. The Saint-Simonians dislikes it. Louis Blanc in 1848 hated it. So when President Sarkozy not long ago rhetorically asked in Berlin 'what Europe owed competition' he was following a respectable national tradition. In a way this is remarkable because the great 19th century French economists were all free traders and the French educational system is super competitive.

I must enlarge on this point because at issue here is a deep-seated difference in views between France and Germany. In a way France stands for the South of Europe, Germany for the North.

Basically, the difference is that the French want intervention by the state while the Germans want more competition and rigor. These differences have been spelled out by Michel Albert, former director-general of the French *Commissariat au Plan* in his book '*Capitalism contre capitalism*'. He contrasts the Rhineland economy with Anglo-Saxon casino capitalism, as he calls it. I think France stands at one end of this dichotomy with its preference for intervention by the state, while Germany, not quite Anglo-Saxon, stands in the middle.

Mr. Barroso, the present head of the Commission, has said that the EU needs 'economic coordination'.⁵ Coordination of what? I fear this would mean less competition.

⁵ Financial Times, 24-08-2010, The Economist, 7-8-2010.

That would not be a good thing. What Europe needs are enterprises are 'red in tooth and claw' and not domesticated ones.

5. *Economic Growth*

Herman van Rompuy also says that we must double our economic growth in order to finance the social welfare state which he refers to as 'the European way of living'. But this advice puts us in a catch-22 situation. In order to double our economic growth, we must reform the welfare state, in particular the labor market. Most political leaders lack the courage to tackle that.

We cannot increase growth if we do not recognize that the party is over. Of the Belgian labor force 35% works between the ages of 55 and 64. We shall all have to work longer and harder. More hours in the week, more weeks in the year, no state pension before the age of 67.

6. *The European Commission*

The result of a market process, according to the European Commission, should not be accepted regardless. First the Commission would have to be able to establish through surveys whether consumers are satisfied. If that is not the case, the Commission could intervene, even if it would be to the detriment of economic effectiveness. This proposal betrays a total lack of understanding of the nature of a market process.

Unfortunately this is not the only thing that makes the European Commission subject to ridicule. Another one is the proposal to give independent women an entitlement to maternity leave. Can we not decide this by ourselves? The Commission's latest proposal is to calculate, alongside the standard of Gross Domestic Product, that of Gross Domestic Happiness. What is that in aid of?

Evidently the European Commission had learnt nothing from the resounding 'No' it had to swallow in France and in the Netherlands. These proposals show that it is getting ready once again to run with its head against the proverbial brick wall. It will never learn. Why is that? The European Commission under Prodi, who was in charge from 1999 to 2004, comprised (for 90% of the time) twenty commissioners. Romano Prodi acted as a *prime minister*. He was the boss, that is true, but there were also able commissioners. Fischler for agriculture, Monti for competition, Lamy for trade. There was genuine discussion in the commission and by no means every proposal made in across the finishing line with the eleven votes (of the twenty).

Under Barroso this has degenerated into a *presidential* system. There are now 27 commissioners. Powers rests with the President and his cabinet. His secretary general has more power than many a commissioner. The discussions in the Commission no longer amount to very much.

What do commissioners want? They want to become famous by getting noticed for initiatives, whether ill-considered or not. The only way to stop this flood of initiatives is to reduce the number of commissioners to what is necessary to run the EU. A

Commission of twelve able people should be large enough to do that. They will be so busy that they will have no time for silly ideas.

It has been proposed to have a smaller number of commissioners than member states, stipulating that this would happen in rotation. This has major disadvantages which has not been given sufficient thought.

A reduction by rotation would mean that at certain times a Commission would have to function without France, Germany or the United Kingdom. Such a Commission would not be credible. Moreover, these large major states will want to safeguard themselves against the time when it becomes their turn, by doing everything in their power to ensure they have as many director-generals as possible of their nationality. A reduction by rotation would therefore lead to a greater politicization of the civil service (than is already the case).

What then? International politics offer a variety of examples: the Security Council, the IMF, the EIB. Which of these models deserves to be pursued? The European Union has large and small member states. The large member states are France, Germany and the United Kingdom, followed at some distance by Italy, Spain and Poland. The other member states are small. The Netherlands is the largest of the small states, which we constantly mention without making much of an impression.

Now Poland has a bigger say than Lithuania, Italy than Greece and France than Belgium. We can say, like Calimero, that this is unfair, but it remains a fact. An unwillingness to see reality is not a recipe for good governance.

This line of reasoning would mean that – as in the Security Council – the six largest member states have a permanent commissioner post, leaving six posts for the smaller member states. How these should be divided up is open for discussion.

I can hear people grumbling that this looks like the detested directorate of the powerful. This will not necessarily be the case. People will always listen to a capable person who knows what he is talking about. Moreover, the large countries do not by definition agree with each other, as was made clear by the war against Iraq.

Slovenia is now a member. Croatia and Serbia are on their way, and Bosnia and Macedonia will follow. Five commissioners who speak the same language. Plus Albania. Each of them with their own commissioner? It would be better to act now rather than to find ourselves in the near future with an unmanageable Commission.

7. *The European Parliament*

The European Parliament is still living in a federal fantasy. It still wants 'more Europe'. It wants the Commission to take up every initiative that comes along. There is even a confused soul who wants an initiative on *obesity*. The mistake that is made time after time is this: because a matter is important or desirable, the Commission must take it up. But this is absurd. The European Parliament has *legitimacy* because it is elected in a proper manner. But it is not *representative* because, except in Belgium and in the European Commission, the citizens do not want a federal Euro. This shows up the true democratic deficit. Unelected bureaucrats wield a great deal of power but the citizens of Europe cannot exercise control since the European Parliament does not reflect their wishes.

It is a curious Parliament because it does not have an opposition. It may be divided on particular issues like the Services Directive but not on matters of essence. It wants the European Commission to undertake new tasks without heeding the doctrine of subsidiarity. It constantly wants 'more Europe', indeed like the accession of Greece to the EMU. It still believes in an 'Ever Closer Union', as the Preamble to the original Treaty of Rome has it, even though the Treaty of Lisbon has put paid to that concept. The few critical Members of Parliament are looked upon as heretics. Above all the European Parliament want the EU to have more money.

8. *Finances*

The Prodi Commission has had to propose a budget for the period 2007-2013. President Prodi wanted to increase the factor by which the combined GDP of the EU is multiplied to its maximum of 1.24%. At that time actual expenditure was 0,95%. Romano Prodi wanted a double acceleration: firstly, in line with the growth of the EU's combined GDP, secondly from 0,95% to 1,24%. Most commissioners agreed with him. There were two dissidents. Michael Schreyer, who was Commissioner for the Budget, proposed 1.10%. I said 1.0% was enough. I said this for two reasons. Firstly, because all treasuries in Europe had to save money and it would not do for the EU to be profligate; and secondly, because budgetary largess prevents programmes that have failed or become superfluous to be weeded out. Luckily the Council of Ministers decided upon 1%.

The European Parliament now wants a budgetary increase for next year of 6%. This proposal shows that it has lost contact with reality, in view of what national treasuries have to face.

The chairman of the liberal group in the European Parliament is Guy Verhofstadt, former prime minister of Belgium. He wants to issue euro bonds, so that the EU can spend more. He is probably thinking of the saying by the American journalist H.L. Mencken; 'No politician becomes well known by saving money. Spending money is what makes him'.

Commission President Barroso has now adopted this idea. He wants to issue bonds for infrastructure projects together with the European Investment Bank (EIB). The Netherlands must never agree to this. We are one of the few net contributors and must not lose control over the flow of funds. Governments rightly want to be in charge of where taxpayers' money goes. It will not be difficult for the Commission to make cuts in programmes and funds. Let the Commission start with the Regional Fund.

9. *Opt-outs*

The Dutch government and Parliament must keep a much closer eye on their affairs, which affect us all. Our intentions regarding family reunification are now hampered by

European legislation. Why didn't we, when the Lisbon Treaty was still being negotiated, stipulate an opt-out as the British and Danes did, so that we could do our own thing? The Netherlands suffers from an exaggerated internationalism. That is an expression of our inferiority complex.

The awful thing about politics is that so many nice people are wrong and have the unwelcome truths to the hard-faced men who win few elections. Of course, the decline can be seductive. But it undercuts itself for we live in a jealous and competitive world. So please, let the European Union be less of a "feel good" institution and let there be no more gesture politics.

THE UNITED STATES OF EUROPE – DREAM OR REALISTIC OPTION?

Hoai-Thu Nguyen

Abstract: The dream of Europe united under a single federal rule has always been inherent in European history and was often expressed through the notion of a ‘United States of Europe’. The exact same idea is also embraced by the term ‘European federation’, which has been the implicit aim of European integration since the 1950s. However, such a federation is now often considered nothing more than a utopian dream of politicians that are out of touch with the political reality of today, such as the former Belgian Prime Minister Verhofstadt who is advocating the creation of a United States of Europe. This paper will rebut this assumption and show that a United States of Europe is indeed more than merely an utopian idea. Instead, it is a realistic and desirable aim with quite high chances of being achieved. The paper will analyze the federal status of the EU as it exists today, whether it is possible for it to become a European federation and whether such a development would be desirable. The paper will also touch upon two theories on how such a United States of Europe could be achieved.

1. Introduction

The dream of Europe united under a single rule dates back as far as to the Roman Empire in the first and second century AD and has been present throughout European history ever since.¹ However, it was not until the Second World War that many European politicians argued for a European unification through consent of its citizens instead of conquest.² One of the most popular proponents of such a Europe were the former communist Altiero Spinelli, who called for the creation of a ‘European Federation’ in his *Ventotene Manifesto* in 1941.³ Winston Churchill also argued for a ‘United States of Europe’ in his speech in 1946 as a means to prevent further wars and with it the destruction of the continent⁴ as did Jean Monnet, one of the founding fathers of the European Union.⁵

Both terms - the ‘European Federation’ and the ‘United States of Europe’ - describe the same idea of a united Europe under one state in a federal manner as the final stage to the European integration process.⁶ Even though opposed by many, this idea has survived until today and is continuously being advocated by others, such as the former Belgian Prime Minister Guy Verhofstadt in his book *The United States of Europe* (2006) or the former German Foreign Minister Joschka Fischer in one of his speeches (2000).

¹ E. Wistrich, *The United States of Europe*, (Routledge, 1994), vii.

² B. Nelsen *et al.*, *The European Union*, (Palgrave Macmillan, 2003), 3.

³ Nelsen, *The European Union*, 3.

⁴ *Ibid.*, 7.

⁵ Wistrich, *The United States of Europe* vii.

⁶ *Ibid.*, 19.

The question that remains to be answered, however, is whether such a European federation – or United States of Europe – is a realistic and desirable option or merely an unrealistic dream supported by politicians that are out of touch with the political reality of today. In order to do so four issues must be analyzed.

First of all, it must be determined whether the EU can already be classified as a federation or whether it actually constitutes a confederation or an association of compound states as argued by some. Secondly, the question must be answered whether it is even possible for the EU to become such a European federation or whether its specific characteristics render such a project *a priori* pointless. Thirdly, it must be examined whether a European federation would be a desirable and desired development, both by the citizens and politically speaking. And lastly, if the answers to the previous two questions turn out to be positive, the question emerges in what ways the transformation from the European Union to the United States of Europe could be achieved.

2. *The European Union – Already a Federation?*

When the French Foreign Minister Robert Schuman put forward his proposal for a European Coal and Steel Community (ECSC) in 1950, he described it as the first step in ‘laying the foundations of a European federation’.⁷ Ever since the European integration process has in its core been a federalizing process with a European federation as its final goal.⁸ However, for the following decades most commentators would still classify the European Community as an intergovernmental or supranational organization rather than a federation.⁹ While the Single European Act in 1986 was considered a further step towards the creation of a European federation, it was not until the Maastricht Treaty that the European Union acquired some sort of a federalist nature.¹⁰ In order to understand this, first the notion of a federation as opposed to a confederation must be clarified.

The modern idea of a federation is the separation of powers between a central level and a regional level whereby the citizens have an identity at both levels. Government activities are divided between a central authority and a regional authority with each level having the power on final decisions in its allocated field of activity.¹¹ A federation is based on a treaty with all residents within it and the regional authorities do not exercise sovereignty, but are merely subordinate states.¹²

In contrast, a confederation is not as tight-knit as a federation but rather a form of cooperation between private or public bodies that want to retain their individual independence and that do not want to merge into a large single body. The members of a confederation do not transfer their sovereign autonomy to a central level, which is why they are in general weaker, less centralized and less stable than federations.¹³ It is based on a two-level contract and every confederal decision requires unanimity of the member

⁷ Ibid, vii.

⁸ M. Burgess, *Multinational Federations*, (Routledge, 2007), 150.

⁹ D. McKay, *Federalism and European Union – A Political Economy Perspective*, (Oxford University Press, 1999), 17f.

¹⁰ Ibid, 18f.

¹¹ Ibid, 15f.

¹² C. Blankart, ‘The European Union: confederation, federation or association of compound states?’, 18 *Constitutional Political Economy* 2 (2007), 100.

¹³ K. Newton *et al.*, *Foundations of Comparative Politics*, (Cambridge University Press, 2005), 74.

states. A more centralized form of a confederation is a supranational government, whereby the participating countries give up sovereignty in certain matters agreed upon. This form is, however, very rare, with the European Union being the first and most advanced example of supranationality up until now.¹⁴

As mentioned before, the Single European Act in 1986 was a further step towards the creation of a European federation because it limited national vetoes, and thus national government's sovereignty, through the introduction of qualified majority voting in the Council for some policy fields, and because it strengthened the European Parliament's role in the legislative procedure. But it was not until the Maastricht Treaty that the European Union acquired an indisputably federalist nature.¹⁵

Institutionally, the European institutions were further strengthened in relation to national governments by the Treaty of Maastricht, e.g. through the implementation of the co-decision-making by the Council and the Parliament.¹⁶ The transfer of sovereignty over the economic policy from the national level to the supranational level and the proposed monetary union removed one of the most important government functions from the hands of the Member States to the Union. By doing so and by accepting the subsidiarity principle acknowledging that the Union would have 'exclusive' competence in some areas, the Treaty created a clear separation of powers between the European level and the state level.¹⁷ Moreover, it was only due to the insistence of the United Kingdom that the European Community was not renamed a federation but a Union.¹⁸ In the light of these developments, the question must be answered whether the EU as it exists today indeed constitutes a federation or not.

One point of view is that the European Union, after the implementation of the Treaty of Maastricht, is a species of a federal state because it fulfills almost all criteria for federalism, including a federal government with assumed exclusive powers, two levels of citizenship and a supranational framework for European-wide policy-making.¹⁹ And while some commentators do not go as far as to call the Union a federation, they nevertheless treat it like one. By applying the works of EU scholars on comparative federalism, they deduced that the European Union can be seen and analyzed as a federation, even though it does not possess all necessary attributes of statehood, because it has the necessary minimal attributes of a federal system.²⁰

Others, on the other hand, reject the idea of the EU being federalist because it lacks important elements of a federal state such as the transfer of sovereignty to a federal level in the field of defense. Furthermore, the legislative decision-making power seems to be nothing more than an accumulation of national decision-making authorities as opposed to a federal parliament representing a federal constituency.²¹ Hence, despite increasingly more cooperation in the area of a common security and defense policy as well as increasing powers of the EP many commentators consider the European Union a hybrid between a federation and a confederation as it possesses both federal and confederal

¹⁴ Ibid., 75.

¹⁵ McKay, *Federalism and European Union*, 18f.

¹⁶ Ibid, 19.

¹⁷ Ibid, 21.

¹⁸ Ibid, 19.

¹⁹ Ibid, 21f.

²⁰ R. Kelemen, 'Built to Last? The Durability of EU Federalism', *European Union Studies Association* (2007), 52.

²¹ D. MacKay, *Designing Europe*, (Oxford University Press, 2001), 9.

characteristics.²² Federal characteristics are for instance the Commission, which is a quasi-executive, and the powerful European Court of Justice, whose decisions have precedence over national law and who holds sovereignty over some matters.²³ Also the European Parliament can be seen as an element of a federation.²⁴ Confederal traits include the unwillingness of the Member States to give up sovereign autonomy in some areas such as the economic and social policy, a weak parliament as well as a weak common foreign policy.²⁵ The European Council can also be classified as a confederal element as it consists of the heads of governments of the Member States.²⁶

So while it cannot be denied that the European Union as it exists today possesses indisputable federal characteristics, it is not quite a federation yet as disputed by some. Instead, it seems more appropriate to describe the EU as a combination of a federation and a confederation due to existence of its many confederal traits and the lack of several important federal characteristics – thus it can be classified as an association of compound states, which is neither a federation nor a confederation but a mix of both.²⁷

3. *The United States of Europe – a Realistic Possibility?*

Since the 1950s, every step taken in the European integration process has been taken with the implicit final goal of forming a European federation.²⁸ However, the signing of the Treaty of Maastricht in 1992 constitutes an important turning point with regard to a federalist Europe as already mentioned in the previous section. While some consider the Maastricht Treaty to be so federalist in nature that its implementation has transformed the European Union into species of a federal state,²⁹ others argue that the dream of a European federation has actually turned utopian as soon as the Treaty was signed and ratified.³⁰ This section will focus on the latter point of view and discuss whether the idea of a European federation must be marked off as an unrealistic dream or whether it can be considered a realistic possibility that the European Union is moving towards to.

The European Community was renamed the European Union instead of a Federation by the Maastricht Treaty due to the British opposition, who did not only enforce their will with regards to the labeling of the former EC but also managed to ban the infamous f-word out of the preamble by replacing the phrase ‘process leading gradually to a Union with a federal goal’ with ‘an ever closing union among the peoples of Europe’.³¹ Even though this is seen by some as an indication for the federalist nature of the EU (see section above), others interpret it as one of many signs of opposition against the formation of a European federation as the UK was not the only country to disapprove such a development. Other countries such as Germany that up to that point have always been supportive of a federal Europe feared having to sacrifice highly valued institutions,

²² MacKay, *Designing Europe*, 9.

²³ Newton, *Foundations of Comparative Politics*, 76.

²⁴ Blankart, 18 *Constitutional Political Economy* 2, 100.

²⁵ Newton, *Foundations of Comparative Politics*, 76.

²⁶ Blankart, 18 *Constitutional Political Economy* 2, 100.

²⁷ Blankart, 18 *Constitutional Political Economy* 2, 100.

²⁸ Burgess, *Multinational Federations*, 150.

²⁹ McKay, *Federalism and European Union*, 19f.

³⁰ A. Heinemann-Grüder, *Federalism Doomed?*, (Berghahn, 2002), 230.

³¹ *Ibid*, 230.

while commentators noticed a lack of a European citizenry, on which a federation usually is based on.³² Furthermore, every enlargement of the Union resulted in more heterogeneity within the EU, which also led to more diversity with regard to the question of where the integration process should find its endpoint as many countries perceive a European federation as a threat to their sovereignty and national identity.³³

Hence, some scholars tend to come to the conclusion that the European integration process can be best summarized as ‘Maastricht forever’, as it will not further develop in a federal direction anymore, considering the circumstances of the signing of the Treaty³⁴ as well as the failure of the European Constitutional Treaty in 2005. The latter is alleged to lead to a long, if not indefinite, period of immobility with regard to further integration. However, this allegation is rebutted by Verhofstadt as will be described in the next section.³⁵

Another obstacle to the establishment of a European federation that is linked to the heterogeneity in Europe is arises in the field of the foreign and security/defense policy, in which the EU as a federation would have full sovereignty over.³⁶ The protection of territory as well as the protection of the people within that territory has always been an exclusive responsibility for the nation states. A common foreign and security policy under a federal authority must be based on a common understanding of what constitutes vital European interests – something that simply does not exist yet.³⁷

Thus, the heterogeneity in Europe seems to be considered a major impediment to the creation of a United States of Europe. Even though it is widely accepted that many similarities exist between the peoples of Europe, rooted in the same heritage and Christianity, this conscience of similarities will not be sufficient in advocating a European federation.³⁸

However, others argue that the notion of federalism is so wide and flexible that a federation in Europe must not necessarily be doomed.³⁹ Instead, if a federation is not seen as an all-or-nothing state but more as a matter of different degrees of a possible federal Europe, it will even become a realistic and remote possibility.⁴⁰ This view is also supported by the past, as other multinational federations such as the Soviet Union and Yugoslavia could be successfully created and lasted for over seventy years.⁴¹

Moreover, the European Union as it exists today, even though not a federation yet, already has many federal safeguards, which are elements maintaining stability in federations.⁴² For example, strong structural safeguards are measured by the representation of state governments in a powerful upper legislative chamber, which the EU has since the governments of the Member States are directly represented in the Council of Ministers, appointing the Commission and its President and ECJ judges and

³² Ibid, 230.

³³ Ibid, 231.

³⁴ Ibid, 231.

³⁵ K. Gnath, ‘Guy Verhofstadt and the ‘United States of Europe’: The Eurozone as a new core Europe?’, 1 *The Federal Trust for Education and Research* 22 (2006), 2.

³⁶ G. Majone, *Europe as the Would-be World Power*, (Cambridge University Press, 2009), 63.

³⁷ Ibid, 63f.

³⁸ Burgess, *Multinational Federations*, 168.

³⁹ Heinemann-Grüder, *Federalism Doomed?*, 231.

⁴⁰ Ibid, 232.

⁴¹ A. Gagnon, *Multinational Democracies*, (Cambridge University Press, 2001), 258.

⁴² Kelemen, *European Union Studies Association*, 55.

monitoring the implementation of EU policies.⁴³ And in the European Court of Justice one can find a strong judicial safeguard in the form of a powerful supreme court that is growing even more powerful, building up a body of EU case law and strengthening the EU legal system.⁴⁴ According to Kelemen, the EU has ‘arrived at a stable constitutional equilibrium’ due to these and other safeguards, making a European federation indeed possible.⁴⁵

While the previous analysis was based on more objective factors, also the will of the European citizens must be taken into account when assessing the realistic possibility of a United States of Europe. Many commentators are of the opinion that the creation of a European federation does not depend on the will of the national politicians but rather on the will of the European citizens. As national politicians depend on the support of the people that they represent and that they need to be voting for them,⁴⁶ the question is whether the European citizens and national electorates will actually concede to their national leaders’ visions of a federal Europe.⁴⁷ For example, since 1992, important EU initiatives have been blocked by negative referenda in Denmark, Ireland and Sweden,⁴⁸ while the negative votum by French and Dutch citizens resulted in the failure of the Treaty Establishing the Constitution for Europe.⁴⁹

So even though the creation of a United States of Europe seems objectively indeed possible, much will depend on the will of the European people as well. This issue will be dealt with in the following section.

4. *The United States of Europe – a Desirable Development?*

The former Belgian Prime Minister Guy Verhofstadt calls for the creation of a European federation in his book *The United States of Europe* (2006), which he says to be ‘the dream of Europe’s citizenry’. In his opinion, the rejection of the Constitutional Treaty in France and the Netherlands was not because the citizens wanted less integration but actually because they wanted more integration and more Europe.⁵⁰ Others, in contrast, argue that the negative referenda were a sign of opposition against European integration.⁵¹ This section will analyze the arguments put forward by Verhofstadt in favour of a United States of Europe and evaluate whether they hold true with regard to the European mass public.

There is no doubt as to the fact that Europe is in a crisis. Not only does it seem to be incapable of decision-making but it also suffers from a lack of support by the public mass, demonstrated by the negative referenda on the Constitutional Treaty in France and the Netherlands, leading to a confidence crisis. Moreover, important issues of vital

⁴³ Ibid, 56.

⁴⁴ Ibid, 57f.

⁴⁵ Ibid, 65f.

⁴⁶ N. Fliegestein, *Euroclash*, (Oxford University Press, 2008), 248.

⁴⁷ S. Fabbri, *Democracy and Federalism in the European Union and the United States*, (Routledge, 2005), 39.

⁴⁸ Ibid, 39.

⁴⁹ B. Stefanova, ‘The No Vote in the French and Dutch Referenda on the EU Constitution: A Spillover of Consequences for the Wider Europe’, 39 *PS: Political Science & Politics* 2 (2006), 251

⁵⁰ G. Verhofstadt, *The United States of Europe*, (The Federal Trust, 2006), 71.

⁵¹ A. Szczerbiak et al., *Opposing Europe: The Comparative Party Politics of Euroscepticism*, (Oxford University Press, 2008), 1.

importance for the future of the EU such as agricultural reform, a common security policy and the European constitution are dropped from the agenda, resulting in a standstill in the integration process.⁵² Many commentators and Member States, for example the UK, see these issues as clear arguments against any further European integration and reject any measures in such a direction.⁵³ Other arguments against further European integration is the lack of the level of legitimacy present at national level⁵⁴ as well as the willingness of the elite to sacrifice policy effectiveness and democracy in favor of deeper integration.⁵⁵ And if the present degree of European integration seems to be too much for the EU to handle as it has not achieved the desired results, the question must be posed, if an even deeper integration step would not be bound to fail.

Verhofstadt denies this and, in contrast, even calls for a ‘politically strengthened Eurozone [...] which lies at the core of a “new Europe”’ in form of a United States of Europe.⁵⁶ He admits that the European Union as it stands has neither been capable of addressing the widespread fears of economic insecurity and social pressures resulting from globalization nor of counteracting the decreasing sense of European identity resulting from the never-ending enlargements of the EU, but attributes this inability to the EU’s insufficiently coordinated and effective policies.⁵⁷

A European federation with unified policies, on the other hand, would in his opinion provide Europe with the necessary tools to be more efficient in solving its current crisis. Other neo-federalists agree with him in that a federal Europe could save the welfare state that is threatened by globalization and neo-liberalism.⁵⁸ Verhofstadt rests his theory on the federal development of the USA, where a common budget and constitution were important in solving issues that could only be solved adequately on a federal level.⁵⁹ According to him, the lack of support from the European people is a consequence of the EU’s poor economic performance of many Member States as, in his opinion, European integration is invariably interlinked with its economic success.⁶⁰ A common economic policy on a federal level, with the current euro-zone as its core, and including a strong concerted social policy, would be a valuable element for reaching such a success, because a federal Eurozone would be a more prosperous Eurozone, which in turn would lead to more legitimacy and attractiveness of it in the eyes of the European citizens.⁶¹

This is important because even though it can be safely assumed that most European elites have been very supportive of European integration, as it has always been an elitist project,⁶² this does seem to be the case with regards to the European citizenry, as Verhofstadt has also remarked. European economic integration up until now has resulted in many benefits such as an increase in trade and employment, lower costs for goods and

⁵² Gnath, 1 *The Federal Trust for Education and Research* 22, 1.

⁵³ Ibid, 4.

⁵⁴ Majone, *Europe as a World Would-be Power*, 42.

⁵⁵ Ibid, 34.

⁵⁶ Gnath, 1 *The Federal Trust for Education and Research* 22, 1.

⁵⁷ Ibid, 1.

⁵⁸ Majone, *Europe as a World Would-be Power*, 63.

⁵⁹ Gnath, 1 *The Federal Trust for Education and Research* 22, 2.

⁶⁰ Ibid, 2f.

⁶¹ Ibid, 2f.

⁶² Majone, *Europe as a World Would-be Power*, 22.

services for consumers and more interaction between the people of different countries⁶³ and there is no reason why these advantages should not remain or even intensify upon the creation of a European federation.

However, these advantages have not been felt by the whole European citizenry. According to Fliegstein, the European population can be divided into three groupings. The first grouping, comprising 10-15% of the population, is deeply interlinked, both socially and economically, with their European neighbours⁶⁴ and more likely to support a European federation. It includes namely managers, professionals, government personnel, people with higher incomes, the young, and the educated, who have benefited both materially and culturally from the European integration and hence, are more inclined to identify themselves as members of a common Europe,⁶⁵ leading to a favorable attitude towards a European federation. The second grouping makes up 40-50% of the citizenry and is more attached to their national country, while still having contact to other Europeans and the EU.⁶⁶ This group must not necessarily support but will at least probably not oppose the idea of a European federation.

The last group comprising 40-50% or more of the European population, on the other hand, is older, less educated and most likely poor without any link to the EU or their European neighbours, which is why they are more fearful and hostile towards further European integration⁶⁷ as they have not felt any advantages through the European integration process. They remain attached to their national politics and doubt the effectiveness of EU politics in protecting them with regards to the threats by the economy, illness and old age⁶⁸ because they fear that a European welfare state would deprive them of their privileges that they enjoy in their national welfare system.⁶⁹ Fliegstein concludes that once the population ages and this last group is replaced by the younger generation, Europe will be more popular,⁷⁰ in which case a European federation seems more likely to be desired by the citizens.

Hence, it seems like, even though the creation of a United States of Europe is not yet desired by the citizens, the chances of a change of mind of the European people in favour of a federal Europe seem to be very high. This change in attitude might even be furthered by the United States of Europe itself, as alleged by Verhofstadt, by increasing its legitimacy and attractiveness through economic success.

5. *The Road to the United States of Europe – How to Achieve it?*

So, if the creation of a United States of Europe is not only possible but also desired, how should this be done? Theories on how to achieve such a federation have already been developed during the founding days of the Community by several integration theorists

⁶³ Fliegstein, Euroclash, 244.

⁶⁴ Ibid, 250.

⁶⁵ Ibid, 249.

⁶⁶ Ibid, 250.

⁶⁷ Ibid, 250.

⁶⁸ Ibid., 245.

⁶⁹ Ibid, 248.

⁷⁰ Ibid, 251.

such as Altiero Spinelli and his theory on federalism.⁷¹ However, for the purpose of this paper only two recent neo-federalist approaches will be described.

One neo-federalist is the former Belgian Prime Minister Guy Verhofstadt, who, in his book *The United States of Europe* (2006), calls for a United States of Europe with a politically strengthened Eurozone as its core.⁷² He acknowledges that after the recent enlargements the European Union can no longer be considered homogenous but must instead be seen as consisting of many different countries with very diverse needs.⁷³ For that reason he proposes to create a federal entity in the middle of the new Europe – the ‘United States of Europe’ – which is highly integrated and which is surrounded by an ‘Organization of European States’ in the form of a more intergovernmental confederation.⁷⁴ This federal entity should be derived from the current Eurozone because its members have proven to be highly committed to the European integration process through giving up their monetary sovereignty.⁷⁵ Moreover, their state of deeply economic integration can be a starting point for further integration.⁷⁶ All Member States not willing to enter into a European federation yet should have the choice to join the Organization of European States, while all others wishing to enter into the federal entity due to the political benefits of such a cooperation should be able to do so.⁷⁷

Another neo-federalist is the German Foreign Minister Joschka Fischer who, during his lecture at the Humboldt University in 2000, proposed the signing of a Constitutional Treaty by those Member States that wish to deepen the European integration, which, in turn, might be an incentive for other Member States to join as well after some time.⁷⁸ In his view, a federation is only possible if national institutions are also involved in the integration process as active participants, which is why he called for a separation of powers between the federal level and the national level. This division of sovereignty would include a bicameral federal parliament representing both Europe of the nation states and Europe of the citizens in order to bring together the national political elites and the mass public. While the members of the lower chamber of the federal parliament would be directly elected and also members of their national parliaments, the upper chamber could be either a directly elected senate as in the US or council appointed by the Member States as in Germany.⁷⁹ The federal executive, i.e. the European government, could either be composed of the governments of the Member States like the European Council at the moment or evolve from the present Commission with a directly elected President with wide executive powers.⁸⁰

Fischer furthermore argued that a federation could not be achieved through supranational institutions promoting further European integration. Instead, a ‘period of enhanced intergovernmental cooperation in such policy domains as environmental protection, crime control, immigration and asylum, and, of course, foreign affairs and security’, in which national governments would be primarily responsible for the

⁷¹ Nelsen, *The European Union*, 3.

⁷² Gnath, 1 *The Federal Trust for Education and Research* 22, 1.

⁷³ Verhofstadt, *The United States of Europe*, 71.

⁷⁴ Gnath, 1 *The Federal Trust for Education and Research* 22, 2.

⁷⁵ Ibid, 2.

⁷⁶ Ibid, 2.

⁷⁷ Verhofstadt, *The United States of Europe*, 71.

⁷⁸ Majone, *Europe as the Would-be World Power*, 61.

⁷⁹ Ibid, 61.

⁸⁰ Ibid, 61.

cooperation, should forego the federation. This intergovernmental cooperation should be mainly political.⁸¹

6. *Conclusion*

The United States of Europe is often alleged to be a utopian dream that is out of touch with the political reality today, especially after the signing of the Treaty of Maastricht and, more recently, the failure of the Constitutional Treaty in 2005, which would have been a major step towards a federal Europe. But does this hold true?

The first section of this paper concludes that the European Union as it exists today does indeed not constitute a federation yet because it lacks too many important criteria of a federal state while possessing too many confederal traits. Hence, it must be classified as a mixture between federation and confederation in form of an association of compound states.

However, it does not follow from this that the EU is barred from becoming a federation in the future. While it holds true that there are many obstacles to creating a full-fledged federal state in the classical manner due to the heterogeneity inherent in Europe, nothing is speaking against the formation of a multinational federation of lesser degree as has been done several times throughout history. Quite to the contrary, the federal safeguards existing in the Union today are actually an indication that the United States of Europe constitutes a realistic and achievable aim, provided that it can attain the support of the European citizens.

Even though currently most European citizens do not seem to support such a federation yet, there are indications that this attitude is most likely to change soon. In this case a United States of Europe would not only be possible but also desirable, especially with regards to the economy as it is alleged to entail economic prosperity through more efficient policies.

As to the question of how a United States of Europe should be established, there are different people advocating different models. But as these models are purely theoretical, it cannot be evaluated in this paper which one will be the most successful. Instead they must be tested through their practical application.

In conclusion, it can be said that the United States of Europe is more than merely an unrealistic dream of some politicians. Present throughout the European history, it still constitutes a desirable goal. And even though Europe must not be federalized right now or anywhere in the near future, the idea of a United States of Europe should be born in mind in order to be realized when the time is right, which will be when the citizens of Europe undergo a change of attitude towards supporting such a European federation.

⁸¹ Ibid, 62.

ENHANCED STAKEHOLDER AND CITIZEN CONSULTATION IN EU DECISION-MAKING: IS THERE A NEED?

Thekla Hillebrecht

Abstract: Since the perceived ‘democratic deficit’ in EU decision-making has entered the academic and political discussion, the demand for closer involvement of stakeholders and citizens in the Commission’s agenda-setting has been voiced. In 2001, the Commission has issued a White Paper on European Governance in response, providing tools for enhanced consultation of interest groups. A Communication apt for citizens, the so-called Plan D, followed in 2005. Additionally, the Treaty of Lisbon has aimed at giving stakeholders and citizens a stronger standing in Union affairs. In light of these developments, participatory democracy has evolved to a political discourse that has virtually overshadowed the Union’s representative legitimacy. This is not necessarily justifiable. Firstly, because the Commission’s rhetoric does not easily translate to practice. Secondly, because participatory democracy needs to provide a genuine added value against the background of parliamentary representation as the EU’s democratic foundation. The ‘new dialogue’ suffers from practical shortcomings and conceptual flaws, which question its added value. In light of these findings, the usefulness of enhanced stakeholder and citizen consultation in EU decision-making must be put into perspective in order to allow for a re-assessment of the relationship between participatory and representative democracy.

1. Introduction

Within the last two decades¹, the European Union has undergone a gradual shift from representative to participatory democracy. This is not to say that the idea of legitimizing EU decision-making through an elected Parliament has in all instances been replaced with a form of involvement permitting interest groups and citizens to negotiate with the Commission directly. Rather than in actual practice, the shift in approach can be seen in conceptualized visions concerning the future route of European democracy. Since ‘democratically deficient’ has become the catchphrase used to characterize various aspects of EU procedures², the need to redefine the legitimacy of EU decision-making has been widely felt at all levels, not least at the institutional level itself. In recent years,

¹ Andrej Luksic and Maja Babor, ‘Participatory Democracy Within the EU: A Solution for Democratic Gap?’, *Journal of Comparative Politics* 3:2 (2010), pp. 85 – 103, at p. 87.

² Originally, the formal set-up of the European Parliament and its place in the institutional European context was at the centre of this critique. Allegedly, the EP was too far-removed from the European citizens and equipped with too little powers than to be able to translate the citizens’ concerns to EU level. With the shift in democratic theory, the term ‘democratic deficit’ is now more widely used in the context of stakeholder and citizen involvement in EU decision-making. See e.g. Paul Magnette, ‘Democracy in the European Union: why and how to combine representation and participation?’, in: Stijn Smismans (ed.), *Civil Society and Legitimate European Governance*, Cheltenham, Edward Elgar, 2006, pp. 23 – 42., at p. 23; Luksic and Babor, p. 86.

the challenge of bridging the perceived gap between the Union and its citizens has frequently been addressed by the concept of participatory democracy.³

On a practical level, however, the question arises how the Commission's presentation techniques of reform translate to actual involvement of both stakeholders and citizens at European level. In its White Paper on European Governance of 2001, the Commission set out its aim of 'opening up the policy-making process'⁴ to embrace participation of organizations and private individuals. In this Communication and subsequent proposals, the Commission forwarded several initiatives designed to implement this goal in EU governance, some of which I shall attempt to evaluate in this paper after briefly having outlined the evolution of participatory democracy in the EU and the rationales underlying the Commission's White Paper. The analytical approach taken for this purpose must be twofold: firstly, regard must be had to the feasibility and usefulness of the respective initiative. In light of this question, the problems and drawbacks attached to the measures on enhanced consultation shall be discussed, my aim being to assess their overall added value. This shall form the second part of my analytical approach, and is a far more intriguing question, since it evolves around the larger context of participatory democracy as a relatively new stance in EU governance. The question then effectively becomes if and how these measures have contributed to re-legitimizing decision-making at EU level. In other words, can the initiatives for enhanced stakeholder and citizen consultation be seen as an adequate response to the debate on democratic deficit? Answering the question of added value will require it to be viewed against the background of representative democracy and how well this model is able to bridge the 'democratic gap' in light of the European Parliament's enhanced powers after Lisbon. In a next section, I shall therefore also be concerned with the relationship between representative and participatory democracy, which might need to be re-assessed in view of the most recent changes in EU law. Lastly, taking into account the aforementioned considerations, this paper shall conclude on the question whether there strictly speaking is a 'need' for participatory initiatives in EU decision-making.

2. *The Evolution of Participatory Democracy in the EU and the White Paper on Governance of 2001*

To allow for an accurate evaluation of the merits of participatory democracy, it is inevitable to first have a short look into the rise of this concept. The added value of popular participation at EU level can also not adequately be assessed without knowledge of the main incentives that lead the Commission to issue its White Paper on Governance in 2001 and an official Communication on Minimum Standards of Consultation the following year.⁵

³ See e.g. Stijn Smismans, 'European Civil Society: Shaped by Discourses and Institutional Interests', *European Law Journal* 9:4 (2003), pp. 473 – 495, at pp. 473, 474.

⁴ Communication from the Commission COM (2001) 428 final: 'European Governance – A White Paper', p. 3.

⁵ Communication from the Commission COM (2002) 704 final: 'Towards a reinforced culture of consultation and dialogue – general principles and minimum standards for consultation of interested parties by the Commission'.

It is widely accepted throughout academic literature that the debate on democratic deficit is at the centre of the emergence of participatory democracy.⁶ While it remains undisputed that the demand for ‘civil dialogue’ has been inspired by the existing gap between actors at EU level and the citizens subject to their decisions, it is less clear at what point in European integration this concept has first become important. If one departs from the argument that the need for democratic legitimization of EU decision-making was the main political and legal stimulus for closer co-operation with actors outside the institutional field⁷, then the importance of interest groups can be traced back to the time when the European Parliament was still a relatively unimportant organ, not elected through popular vote.⁸ Others argue that the Council of Ministers, through direct representation of the Member States, was the main legitimizing organ until its significance somewhat declined by virtue of an increase in qualified majority voting.⁹ Despite earlier references to the involvement of interest groups, a strong conceptualization of participatory democracy has first emerged in the 1990s.¹⁰ When the Commission started working on its White Paper a decade later, it drew on the democratic deficit argument and the ensuing ‘alienation’ of many European citizens from EU decision-making.¹¹ It was feared that the metaphorical gap between the Union and its citizens was yet widened and distrust in the Commission’s work aggravated as a result of the failure of the Santer Commission in the late 1990s.¹² It is in this context that the Commission called for democracy-driven initiatives and greater transparency through a simplification of its procedures.¹³ While the language of the Commission suggests that enhanced democracy is one of the main targets of its White Paper, it should not be forgotten that greater legitimacy of EU decision-making also responds to the Commission’s self-interest in increased efficiency. It shall not be the aim of this paper to discuss the concepts of democracy and efficiency as two opposing poles which need to be

⁶ For a detailed discussion on the political discourse concerning the European Union’s democratic deficit, see generally Giandomenico Majone, ‘Europe’s Democratic Deficit: the Question of Standards’, *European Law Journal* 4:1 (1998), pp. 5 – 28; Andreas Follesdal and Simon Hix, ‘Why there is a Democratic Deficit in the EU: a Response to Majone and Moravcsik’, *Journal of Common Market Studies* 44:3 (2006), pp. 533 – 562. For a more detailed discussion on the relationship between a model of democratic deficit and participatory democracy, see generally Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, Berkeley, Los Angeles, 2003.

⁷ Smismans, p. 484.

⁸ See e.g. Justin Greenwood, ‘Review Article: Organized Civil Society and Democratic Legitimacy in the European Union’, *British Journal of Political Science* 37 (2007), pp. 333 – 357, at p. 343.

⁹ See e.g. Kenneth Armstrong, ‘Rediscovering Civil Society: The European Union and the White Paper on Governance’, *European Law Journal* 8:1 (2002), pp. 102 – 132, at pp. 103-104; at Marcus Höreth, ‘The European Commission’s White Paper on Governance: A ‘Tool-Kit’ for closing the legitimacy gap of EU policy making?’, Centre for European Integration Studies Bonn, November 2001, at p. 7.

Available at: http://ec.europa.eu/governance/contrib/hoereth_en.pdf (last visited on 8 December 2010).

¹⁰ Beate Kohler-Koch, ‘The Organisation of Interests and Democracy in the European Union’, in: Beate Kohler-Koch et al. (eds.), *Debating the Democratic Legitimacy of the European Union*, Lanham, Rowman and Littlefield, 2007, pp. 255 – 271, at p. 262; Francesca Bignami, ‘Three Generations of Participation Rights before the European Commission’, *Law and Contemporary Problems* 68:1 (2004), pp. 61 – 83, at p. 61. See also Luksic, p. 88; Smismans, p. 475.

¹¹ COM (2001) 428 final, p. 7; see also Kohler-Koch, p. 2.

¹² The Commission under President Jacques Santer collectively resigned in March 1999, following the discovery of the Commission’s fraudulent management of funds. For a detailed discussion of this series of events in the context of the ‘democratic deficit debate’, see generally Christoph Meyer, ‘Political Legitimacy and the Invisibility of Politics: Exploring the European Union’s Communication Deficit’, *Journal of Common Market Studies* 37:4 (1999), pp. 617 – 639.

¹³ For instance, the Commission saw a need for its policies to be ‘easier to follow and to understand’ (COM (2001) 428 final, p. 4), as well as for simplification of existing EU law and national implementing measures (COM (2001) 428 final, p. 5).

balanced against one another, since both of these aspects can be part of the same process.¹⁴ Timely action is only one component of efficient policy-making, another is the need for decisions to be publicly defensible.¹⁵ The interest-driven character of the Commission's work was an important factor in the drafting of the White Paper. While the Commission emphasizes the need to follow a bottom-up approach in European governance¹⁶, the concept of participatory democracy itself was created in a top-down approach in response to declining credibility of EU institutions.¹⁷ The fact that emergence of this political discourse must be ascribed to the legislative authorities themselves should be borne in mind when reflecting on its added democratic value.

3. *Instruments for Enhanced Consultation of Stakeholders in EU Decision-making*

In its White Paper on European Governance and in several documents issued subsequently, among which a Communication on general principles and minimum standards for consultation of interested parties, the Commission set out instruments aimed at enhanced consultation of interest groups in EU decision-making.¹⁸ It is important to note that the measures contained in the Communication on general principles and minimum standards for consultation were indeed primarily designed for stakeholders or, as commonly referred to, civil society.¹⁹ While individual citizens find mention in this document as part of the group invited to participate in consultation procedures (p. 4), the actual measures which are described seem to be directed towards civil society organizations.²⁰ In fact, the term 'participatory democracy' in this context includes the idea of representative bodies monitoring consultations at the policy-shaping stage. The Committee of the Regions, as well as the Economic and Social Committee, are mentioned as indirect representatives of society and direct participants in the Commission's consultation procedures.²¹ In light of their role as intermediaries between EU institutions and civil society, it is necessary first to define the scope of the term 'civil society' in order to distinguish between different levels of participants in the Commission's agenda-setting.²²

¹⁴ On this discussion and how democracy and efficiency can be reconciled, see e.g. Sabine Saurugger, 'Representative versus Participatory Democracy? France, Europe and Civil Society', Paper presented at the ECPR Joint Sessions of Workshops, University of Uppsala, Sweden, April 13-18, 2004, at pp. 6 ff. Available at: <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/uppsala/ws12/saurugger.pdf> (last visited on 8 December 2010).

¹⁵ Höreth, p. 11.

¹⁶ COM (2001) 428 final, p. 4.

¹⁷ Kohler-Koch, p. 2; Luksic, p. 88.

¹⁸ See e.g. the Better Regulation Action Plan (COM (2002) 278 final), which, as predecessor to the Commission's Communication of general principles and minimum standards for consultation, laid down the general policy objective of simplifying EU legislative and consultative procedures.

¹⁹ This is in line with the White Paper on Governance, which the Commission had already 'primarily addressed' to civil society actors. See COM (2001) 428 final, p. 9.

²⁰ See Philipp Steinberg, 'Governance und Parteien: Politisierung als Möglichkeit größerer bürgerschaftlicher Identifikation – ein Kommentar zum Weißbuch Europäisches Regieren', in: Christian Joerges et al. (eds.): *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6, 2001, at p. 3; Paul Maignette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?', *Political Studies* 51:1 (2003), pp. 144 – 160, at p. 7.

²¹ See COM (2001) 428 final, p. 15; COM (2002) 704 final, p. 3.

²² See COM (2002) 704 final, p. 8.

3.1 The Concept of Civil Society and the Initiatives Following the White Paper of 2001

A problem of general character is the fact that the term ‘civil society’ has never been easily defined. In its White Paper on Governance of 2001, the Commission gave concrete examples of interest groups which it considers to act in the realm of civil society, but issued no explicit guidelines as to institutional requirements imposed upon them. Among other organizations, civil society comprises NGOs, trade unions, professional associations, churches and local political groups.²³ While there are no clear-cut criteria for the institutional set-up of interest groups, the White Paper does aim at a more structured relationship with civil society.²⁴ Among the proposed initiatives to achieve this goal, three main categories of policy objectives can be discerned: firstly, civil society should be more closely involved in EU decision-making, e.g. through co-regulation procedures, partnership arrangements and minimum standards which must apply to consultation procedures.²⁵ Secondly, it can be inferred from the White Paper that civil society should be better accountable.²⁶ This involves for example the database CONECCS (Consultation, the European Commission, and Civil Society), which has been replaced with a voluntary register for interest representatives in 2007.²⁷ Lastly, measures enhancing the role of advisory bodies as intermediaries between EU institutions and civil society can be discerned as a third category, which includes the Economic and Social Committee as well as the Committee of Regions.²⁸

3.2 Feasibility and Difficulties of Stakeholders’ Participation in Policy-shaping

In assessing these initiatives, in particular their usefulness in the context of enhanced democracy in the European Union, some related difficulties should be considered. A preliminary observation applying to all categories of initiatives mentioned above is their non-binding nature. Issued merely in communications, the initiatives by no means create a general obligation to consult civil society at all. The Commission dismissed this concern, stating that non-binding guidelines provided sufficient incentives for compliance.²⁹ Even though this argument seems rather shallow, it shall not be contested on this occasion for lack of an alternative proposal – it is after all highly doubtful whether a legal obligation to consult all interested parties, as the language of the Commission

²³ COM (2001) 428 final, p. 15.

²⁴ Ibid., p. 33.

²⁵ Ibid., see pp. 22 and 17, respectively.

²⁶ Supra note 23, pp. 17, 21.

²⁷ Ibid.; see also the Communication from the Commission COM (2007) 127 final: ‘Follow-up to the Green Paper “European Transparency Initiative”’, pp. 3, 4, 8, 13.

²⁸ See COM (2002) 704 final, p.3. For the legislative framework regulating the tasks of the advisory bodies, refer to Arts. 301-307 TFEU.

²⁹ See COM (2002) 704 final, p. 10.

suggests, could be reconciled with the need to strike a fair balance between legitimizing Union measures and acting in a time-efficient manner.³⁰

The Commission's tendency to limit the scope of consultation for fear of compromising its efficiency can be seen in its White Paper. For instance, the delegation of legislative powers to civil society organizations as foreseen by the co-regulation procedure, mentioned above, is practically insignificant for it can only occur in excessively limited circumstances and depends on wide formulations that leave the Commission enough room for interpretation.³¹ The vague nature of Commission initiatives, starting with the general absence of a normative definition of civil society, is furthermore reproduced in the Commission's proposal to set up partnership arrangements with certain interest groups, depending on their degree of representativeness.³² Such arrangements would imply the granting of privileged positions in consultation procedures with the Commission, but the yardstick against which eligibility of civil society actors is measured is not clear and the requirement of representativeness can be construed to have diverse meanings.³³ Moreover, partnership arrangements raise the concern of segregation, or formation of elitist groups among interest representatives.³⁴ True, these arrangements go beyond the minimum consultation standard referred to above, which only applies to proposals in the policy-shaping phase, and only if the proposal has first undergone an impact assessment by the Commission.³⁵ Thus, while the content of consultation must always be clear and the relevant parties be given an opportunity to voice their concerns and respond to the Commission's views, which must publish consultations and provide feedback, there are some instances of EU policy-making in which certain civil society actors may benefit from an 'upgraded status'.³⁶ Nevertheless, in view of the obscure criteria and the fact that these arrangements only serve certain distinguished actors, they are not highly desirable.

The second category of Commission initiatives outlined above concerns measures which are designed to enhance the accountability of EU institutions and civil society, and to provide greater transparency of their co-operation. While the White Paper had already proposed the establishment of a database which was to list interest groups³⁷, this measure was absorbed and expanded by the European Transparency Initiative of 2005.³⁸ In light of the definitional difficulties concerning the terms 'civil society', 'representativeness' and other catchphrases, the voluntary register for interest representatives which is now in place might provide some clarity by listing concrete examples of interest groups and their

³⁰ In its Communication on general principles and minimum standards for consultation, the Commission vaguely refers to 'interested parties' as one of its main target groups. See COM (2002) 704 final, p. 3.

³¹ For example, use of the co-regulation procedure will be precluded where it concerns a 'fundamental right' or 'major political choice'. See COM (2001) 428 final, p. 21; see also Steinberg, p. 6.

³² According to the Commission's White Paper, civil society actors wishing to enter into partnership arrangements with the Commission need to provide guarantees of functioning internal structures and representativity. See COM (2001) 428 final, p. 17.

³³ See e.g. Greenwood, p. 346; Smismans, p. 481; Armstrong, p. 127.

³⁴ See Magnette, p. 7; Höreth, p. 13.

³⁵ See COM (2002) 704 final, pp. 10, 11.

³⁶ The minimum standard for consultation has been laid down in COM (2002) 704 final, pp. 19-22.

³⁷ Supra note 27.

³⁸ The European Transparency Initiative was originally called into being by the Commission's Vice-President Siim Kallas in his speech 'The Need for a European Transparency Initiative', delivered at Nottingham Business School on 3 March 2005. A Communication from the Commission followed. See Communication from the Commission COM (2006) 194 final: 'Green Paper – European Transparency Initiative'.

organizational structures. With currently more than 3300 registered interest representatives, the Register allows for a clearer image of the actors involved in EU policy-shaping.³⁹ However, since registration is at the actors' own option, the list provided by the Registry is by no means exhaustive. Given these limitations, transparency cannot be enforced but ultimately depends on the willingness of interest groups to co-operate. The practical relevance of the Commission's theoretical framework is thus rather limited in this regard.

Lastly, the role of EU advisory bodies in the context of civil society involvement in policy-shaping should be pointed out. Strikingly, the Commission's Communication on general principles and minimum standards of consultation emphasizes the role of advisory bodies as the main intermediaries between the EU institutions and society at large.⁴⁰ Since they are seen as the principal mediators in consultation procedures, this begs the question to what extent civil society is deemed to have a genuine voice in direct contacts with EU institutions. According to the Commission, these approaches are not mutually exclusive but rather complementary.⁴¹ This position is supported by the fact that the Economic and Social Committee is generally not seen as an influential body in EU decision-making.⁴² Nevertheless, it considers itself to be a 'forum' of enabling quality for civil society actors.⁴³ While placing civil society under a common institutional framework for the sake of legal certainty and clarification is surely to be welcomed, the Commission's emphasis on advisory bodies in this context is conceptually flawed. To say the least, the fact that the dialogue with interest groups evolves in large parts around the work of intermediaries creates a confusing dichotomy between the exchange proclaimed in the Commission's White Paper and the practical attenuation of civil society actors' autonomy. It also appears to be at odds with Art. 11, para. 1-3 of the Treaty on European Union, which for the first time accorded civil society an important place in the Treaties.⁴⁴ At least conceptually, it seems as though intermediating bodies would disrupt the exchange of views referred to in para. 1 and the 'open, transparent and regular dialogue' mentioned in para. 3. Formally, however, the Commission is on the safe side, being empowered to determine the 'appropriate means' with which to consult civil society.⁴⁵

³⁹ Figures as of 8 December 2010. The full Registry is accessible at: <https://webgate.ec.europa.eu/transparency/regin/consultation/statistics.do> (last visited on 8 December 2010).

⁴⁰ See COM (2002) 704 final, p. 3.

⁴¹ Ibid., p. 4.

⁴² Since consultation of the ESC in the legislative process is mostly optional, its role in shaping the Commission's agenda and giving advice in the legislative process is generally seen as marginal. Moreover, its role as consultative body is overshadowed by the European Parliament, which also performs advisory tasks. See Armstrong, p. 117, Smismans, pp. 481 ff.

⁴³ Economic and Social Council Opinion: 'Organised Civil Society and European Governance: the Committee's Contribution to the Drafting of the White Paper', Brussels, OJ C 193 (10.7.2001), pp. 117, 120.

⁴⁴ Art. 11 TEU was drafted as the outcome of the Convention on the Future of Europe in 2002. See Nicolas Beger, 'Participatory Democracy: Organized Civil Society and the "New" Dialogue', *The Federal Trust for Education and Research*, Online Paper 09/2004, July 2004, at pp. 5 – 7. Available at SSRN (Social Science Research Network): <http://ssrn.com/abstract=581442> (last visited on 8 December 2010).

⁴⁵ See Art. 11 (1) TEU.

4. *Participatory Democracy at Individual Level: Enhancing Citizens' Involvement in Agenda-setting*

As was mentioned above, the Commission's call for far-reaching consultation procedures included both stakeholders and the individual citizen.⁴⁶ Nevertheless, it is easy to see from the foregoing considerations that the measures advanced in its White Paper and subsequent proposals were not practically designed for individual participants, but rather aimed at civil society. While on the topic of Art. 11 TEU, it is interesting to have a look at para. 4 which, in addition to a conceptually enhanced role of civil society, for the first time accommodated an instrument that permits citizens to forward a proposal for legislation directly to the Commission.

While the Treaties only provide that the initiating body must consist of at least one million citizens residing in a 'significant number of Member States', the detailed normative guidelines implementing Art. 11 (4) TEU are laid down in a recent proposal from the Commission.⁴⁷ It is only through briefly assessing this proposal that an evaluation as to the practical significance of this new tool will be possible. As a preliminary declaration, it can be said that the thresholds which have to be met in order to forward a legislative proposal to the Commission should not be unreasonably high, since this would stand in bizarre contrast with the Commission's declared objective of consulting widely.⁴⁸ Next to the requirements already mentioned, the main thresholds imposed by the proposal concern the precise number of Member States which have to be represented by an initiative, as well as its quantitative representativeness in each Member State, i.e. the number of signatories in each country. These numbers have been set at one-third of all Member States and determined proportionally to the Member State's population, respectively.⁴⁹ Upon collection of 300.000 signatures from at least three Member States, the initiative's organizer is requested to submit the proposal to the Commission for a preliminary assessment on admissibility.⁵⁰ In view of the fact that such initiative can entail fairly high organizational efforts, depending on the organizer's personal resources, this device should be welcomed.

The above-mentioned thresholds do not seem particularly high; the requirement of one million citizens as an acting body, for instance, comes down to ca. 0.2% of the overall population of the European Union. More interesting is it therefore to look beyond these quantitative restrictions and consider the question of how well the procedural side of the Commission's proposal is suitable to its aim of consulting widely. Coming back to the aspect of organizational efforts, it is seen as a major concern in academic literature that the tools for enhanced stakeholder and citizen consultation provided by the Commission create elitist groups instead of reaching out to society at large.⁵¹ This issue

⁴⁶ Supra note 30.

⁴⁷ COM (2010) 119 final: Commission proposal for a Regulation of the European Parliament and of the Council on the Citizens' Initiative. See also Art. 11 (4) TEU.

⁴⁸ This objective is again referred to in the introduction to the Commission's proposal on the European Citizens' Initiative, see COM (2010) 119 final, p. 2.

⁴⁹ See Art. 7 (1), (2) COM (2010) 119 final. For a list of required signatories per Member State, refer to Annex I of the same document.

⁵⁰ See Art. 8 (1) COM (2010) 119 final.

⁵¹ Stephen Boucher, 'If citizens have a choice, who's listening? Lessons from recent citizen consultation experiments for the European Union', EPIN Working Paper No. 24, June 2009, at p. 9. Available at: <http://www.ceps.eu/files/book/1856.pdf> (last visited on 8 December 2010). See also generally Magnette; Saurugger, p. 5; Höreth, p. 15.

of segregation is intrinsically tied to the discussion on participatory democracy, and particularly relevant in the debate on initiatives concerning individual citizens and their (possibly limited) financial and logistic resources.⁵² Despite the possibility to collect statements electronically for easier completion of the procedural stages, particularly in a transnational context, it is doubtful whether this opportunity for participation will attract the average citizen.⁵³ More likely, this tool might be used by civil society actors or individuals with a specific profile or expertise.

This can be seen in earlier initiatives on citizen consultation coming from the Commission. As a reaction to the failure of a European Constitutional Treaty, the Commission, in 2005, issued its 'Plan D', short for the key words Democracy, Dialogue and Debate.⁵⁴ In subsequent national and transnational citizen panels held by civil society organizations and funded by the Commission, the citizen participants were individually selected by the civil society organizers in what might be seen as a top-down approach.⁵⁵ True, it is inconceivable for the Commission or mediating civil society actors to install an open dialogue with an infinite number of citizens. However, this calls into question the general feasibility of genuine transnational participatory democracy at the level of individual citizens. The European Citizens' Initiative as a new instrument for participatory democracy, allowing in principle anyone to become involved in the Commission's agenda-setting, will yet have to be evaluated in practice. It should however be noted that also here, the possibility for actual exchange is limited, since the Commission is under no obligation to forward a proposal to other EU institutions. It must merely provide general feedback – a rather loose interpretation of 'dialogue'.⁵⁶

5. *Enhanced Stakeholder and Citizen Consultation versus Representative Democracy*

In light of the abovementioned difficulties which the consultation of civil society actors and individual citizens entails, the question as to the actual democratic value of these initiatives arises. I shall at this point refer back to the first section of this paper, in which the emergence of participatory democracy as a framework for new forms of governance was outlined. As has been mentioned, the political discourse on participatory democracy has been shaped by the discussion on the perceived democratic deficit from which the

⁵² Ibid. On elitist citizenship, see also generally Paul Magnette, 'European Governance and Civic Participation: Can the European Union be politicised?', in: Christian Joerges et al. (eds.): *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6, 2001.

⁵³ See Art. 5 (2) COM (2010) 119 final. For a discussion on electronic participation initiatives in the EU, see generally Eleni Panopoulou et al., 'E-Participation initiatives: how is Europe progressing?', *European Journal of e-practice* No. 7, March 2009, available at:

<http://www.epractice.eu/files/7.2.pdf> (last visited on 8 December 2010).

⁵⁴ See Communication from the Commission COM (2005) 494 final: 'The Commission's Contribution to the Period of Reflection and Beyond: Plan-D for Democracy, Dialogue and Debate'.

⁵⁵ For the purpose of this paper, the different debates that were organized under the head of 'Plan D' are too numerous to list. The interested reader is therefore referred to Boucher (supra note 51) for concrete examples. For the scope of this paper and to make my point that citizen consultation by the Commission suffers from obstacles as to practical feasibility, it shall suffice to point out some general shortcomings that are common to different initiatives.

⁵⁶ The Commission's position with regard to a legislative proposal from citizens follows from Art. 11 (b) COM (2010) 119 final. Moreover, Art. 11 (4) TEU itself is merely intended to provide the opportunity for 'invitation' of the Commission to consider a proposal.

Union allegedly suffered, the main aim being to create greater legitimacy of EU policies through enhanced input from civil society. Measured against this objective, it is first interesting to examine in closer detail whether participation by civil society and citizens is an adequate response to the problem.

5.1 Combating the Democratic Deficit

Has the gap between the Union and its citizens been closed through enhanced deliberative democracy? This simple question immediately comes to mind. Yet, matters are not this black and white. For some, a democratic deficit as such does not exist as an institutional problem, but is merely a buzzword to describe the EU's shortcomings in issuing legislation that meets the citizens' anticipations.⁵⁷ Others, acknowledging the existence of a democratic deficit at the level of EU institutions, contend that it can be remedied without even entering into the discussion on participatory democracy.⁵⁸ Whichever view one adopts, the European Union has yet to succeed in fully legitimizing its policies. If one sees the problem at the level of participatory democracy as such, it appears from the foregoing discussion that it is rare for civil society actors to engage in actual dialogue with the Commission, since the initiatives are consultative in nature and often involve advisory bodies acting as intermediaries.⁵⁹ It is yet more difficult for the individual citizen to become involved with the Commission, even by means of a citizens' initiative, as this does not equate to a dialogue. Even if, on the other hand, the problem is identified at the institutional level, for example as a lack of powers of the European Parliament, it equally persists today.⁶⁰ Nevertheless, even though the Parliament still does not have full legislative powers under the Lisbon treaty, the active role of representative democracy has to be reassessed in light of some of the changes introduced by the reform treaty.⁶¹

5.2. Representative Democracy Revisited

It is often alleged that participatory democracy is needed as a new form of governance, since transnational legislation should be subject to higher requirements and meet different criteria than national provisions.⁶² If various perspectives are taken into account at the

⁵⁷ This argument essentially takes on the shift in democratic theory in the 1990s, which identified the democratic deficit to be more closely linked to the concept of participatory democracy as such rather than to the European Parliament's institutional organization (see *supra* note 2). See Paul Magnette, 'Democracy in the European Union: why and how to combine representation and participation?', in: Stijn Smismans (ed.), *Civil Society and Legitimate European Governance*, Cheltenham, Edward Elgar, 2006, pp. 23 – 42, at p. 24; Stephen Sieberson, 'The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit', *Columbia Journal of European Law* 14 (2007-2008), pp. 445 – 465, at p. 454. For a more detailed discussion on this point, see also generally Majone (*supra* note 6).

⁵⁸ Sieberson, p. 464.

⁵⁹ Irina Michalowitz, 'Analysing structured paths of lobbying behaviour: why discussing the involvement of "civil society" does not solve the EU's democratic deficit', *Journal of European Integration* 26:2 (2004), pp. 145 – 170, at p. 151.

⁶⁰ *Supra* note 58.

⁶¹ While the Lisbon Treaty implied some enhanced powers for the European Parliament, for example of budgetary nature and generally concerning the field of application of the co-decision procedure, which has been renamed the 'ordinary legislative procedure', it also put stronger emphasis on the role of national parliaments by means of Protocol (No 1) on the Role of National Parliaments in the European Union, annexed to the Treaties.

⁶² Magnette (2006), p. 28.

policy-shaping stage by means of wide consultations, then implementation might be carried out more effectively and reflect the fact that higher standards have been met at prior stages of EU decision-making.⁶³ While these assessments might theoretically be accurate, they overemphasize the practical ability of participatory tools to legitimize EU policy-shaping. As mentioned in the foregoing sections, there is a danger of elitist group formation inherent in this concept.⁶⁴ Thus, participatory democracy is in itself not particularly democratic.⁶⁵ The possibilities of individual citizens for dialogue with the Commission being limited, civil society actors bear greater representative responsibility than they are able to satisfactorily take on. Pursuing specific, sometimes very personalized goals, interest groups cannot generally be said to represent society at large.⁶⁶ This is a function that parliamentary models of democracy assume best. The fact alone that the Union is built on a representative foundation should sufficiently substantiate the argument that participatory democracy can, at best, be complementary to the parliamentary legitimacy of EU decision-making.⁶⁷ It is argued that if the EU institutions succeeded in creating a more strongly politicized environment at EU level, for instance through replication of national governmental structures, this would further citizens' understanding for the functioning of EU institutions and enhance the public interest in their decisions.⁶⁸ Drawing on this argument, if citizens felt less alienated from the institutions, for instance because they recognized familiar traits in EU governance, we might not even be discussing a problem of democratic deficit, particularly in view of the fact that the European Parliament is able to represent the Union citizens more widely and unconditionally than civil society or the Commission's selective citizen consultations. While the European Parliament has experienced a slight enhancement of its powers through the Lisbon treaty, the European Union as a representative democracy should not stop there. Returning to the argument of stronger politicization at EU level, it would for instance be desirable for the Parliament to be in a position of better scrutiny over the Commission.⁶⁹

6. Conclusion

Throughout the previous sections of this paper, the emergence of participatory democracy as a relatively new stance in European governance has been outlined. I have used the White Paper on Governance of 2001 as a point of departure in addressing some of the initiatives that have been launched in order to engage in a more open dialogue with civil society. The consultation of citizens, in turn, has been given a framework in the Commission's 'Plan D' of 2005, which has provided the background for organization and funding of both national and transnational citizen debates. The primary legislative framework for both civil society and citizen consultation in EU policy-shaping has been included in the Lisbon treaty under Art. 11 TEU.

⁶³ Id.

⁶⁴ Magnette (2006), p. 32; see also *supra* note 34.

⁶⁵ Michalowitz, p. 152.

⁶⁶ *Ibid.*, p. 147.

⁶⁷ Magnette (2006), p. 30. See also Art. 10 (1) TEU, stating the Union's character of a representative democracy.

⁶⁸ Magnette (2006), p. 35.

⁶⁹ *Supra* note 68.

Drawing on the debate on democratic deficit, my aim has been to assess the merits of participatory democracy as a solution to this problem. With regard to this overarching problem statement, I have analyzed the aforementioned initiatives along the lines of their practical feasibility and shortcomings. This has shown that the Commission in fact falls short of its proclaimed 'open dialogue' with stakeholders and citizens. At both levels, the initiatives for enhanced involvement are liable to creating a division between those who are consulted and those who are not. With regard to interest groups in particular, this creates the problem that they are not generally suitable to representing society at large. Rather, they are organized bodies which, albeit outside the institutional sphere, act on their own political agendas. Whether this helps re-approaching EU institutions and citizens is doubtful. This is not to say, however, that direct consultation of citizens would solve all problems. On the contrary, the problem of elite group formations reproduces itself at the level of individual citizens. Since e.g. citizen panels are of selective character and do generally not involve the ordinary citizen, it seems unthinkable for the Commission to consult as widely as the debate on democratic deficit would demand. This begs the question whether participatory democracy as a new form of governance brings any added value to the legitimization of EU decision-making. To merely negate this question and stop at this point of discussion would imply to be ignorant of the fact that the debate on democratic deficit has originated as a perceived lack of the Parliament's representative ability. A lack of trust in EU decision-making and the resulting feeling of alienation is the main drive behind the concept of participatory democracy. Nonetheless, while this debate cannot be denied, it should not be overemphasized. In recent years, 'participatory democracy' has advanced to a veritable catchphrase, even though it has done little to close the gap between the Union and its citizens. Against this background, a reassessment of representative democracy with the European Parliament as its central institution is necessary. Particularly in light of the fact that the term 'democratic deficit' has been placed in a new context, now largely referring to deficient participatory initiatives, and given the enhanced powers of the EP and national parliaments after Lisbon, representative democracy and how it can be strengthened should be the focus of discussion. While participatory democracy is a complementary element of European governance that might prove useful if it is further improved upon in the future, it is not strictly speaking 'needed' in defending EU decision-making. Drawing on Magnette (2006), this paper argues that stronger politicization of the European Parliament could mitigate the feeling of alienation towards institutional actors by enhancing understanding and transparency. Placing greater emphasis on the representative function of the European Parliament might be a powerful tool in legitimizing EU decision-making in the eyes of the European public.

SIMPLIFIED TREATY REVISION PROCEDURE AND DEMOCRATIC ACCOUNTABILITY

Tim Lammers

Abstract: This paper examines the new simplified revision procedures, namely, the simplified treaty revision procedure as stipulated in Art. 48.(6) TEU and the *passarelle* as laid down in Art. 48(7) TEU. The democratic value of the provisions will be assessed and the magnitude of their impact on the Union and its member states. The democratic legitimacy is based on the intergovernmental spirit of the Union. Subsequently some argue that the expansion of its own competences constitutes 'integration by stealth' and thus, undermines the democratic basis of the Union. These concerns expressed by constitutional courts and academics that focus on the unpredictable and uncontrollable power inherent in the Union will be evaluated. Furthermore, this paper juxtaposes the potential increase in efficiency against the inherent danger for the democratic legitimacy of the Union. By scrutinizing the procedures and considering the various means at the disposal of member states, it will become obvious that the danger for democracy, inherent in the new provisions is less severe than one may expect and that serious misgivings about the efficiency of the procedures can be expressed.

1. Introduction

When the German Constitutional Court, the *Bundesverfassungsgericht*, assessed the Lisbon treaty at the end of June 2008, it emphasized the constitution's friendly attitude towards European integration which has to be taken into account for any of its decisions and assessments.¹ Nonetheless, the constitutional court expressed serious qualms about a number of provisions decided upon in Lisbon. Among others, the simplified revision procedure and by the same token the *passerelle* or bridge clause, as implemented under the new treaties, was looked at with serious concern. Those provisions provide for the amendment of certain parts of the EU treaties in a simplified manner and without the need for an intergovernmental conference. Whereas the simplified revision procedure calls for ratification by all member states, the hurdle for the *passerelle* is lower and merely requires a non-objection by the national parliaments.

Besides the Constitutional Court of Germany, other high courts and experts have also assessed the new revision procedures and voiced serious doubts about the actual value of the respective provisions. The main concern regarded the democratic accountability of the revision procedures since not all of them require a ratification by the member states. This was considered a 'political open cheque' and highly dangerous to democracy. Especially the possibility of a tacit approval in the *passerelle* procedure is

¹ BVG judgement paragraph 219ff, Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html, (last visited on 08 December 2010).

seen as dangerous and in some cases as unconstitutional as is the case in Germany. At the same time, the new procedures are critically looked at from the other side as well. Whereas some praise the increase in efficiency, others emphasize the various veto possibilities and actors who have been granted a right to veto in the procedures. In addition, these procedures are strictly limited to certain parts of the Treaties and must not extend the Unions competences. It has been argued that the provided procedures are not designed to change the constitutional framework and thus, do not endanger the current level of sovereignty of the member states. Furthermore, concerns have been voiced that the various veto possibilities may decrease the efficiency of the procedures.

The following pages will look at the different tools for treaty amendments provided for in the Lisbon Treaty and why it has to be treated with reservations. The scope covered by these provisions and the efficiency of the procedures will be examined. Subsequently the efficiency of the procedures will be assessed by examining them in detail and then estimating the possible threat they pose to democracy when considering the available safeguards for member states to restrict the Union's powers.

Major starting point and cornerstone of the paper will be the judgement of the German Constitutional Court of the 30th of June 2009, which elaborates on several of the arguments that will be scrutinized in this paper. At the end the different arguments will be compared and judged in order to assess whether or not the possible advantages in efficiency outweigh the issue of a lack of democracy and therefore justify the new amendment procedures stipulated in the TEU.

2. *Procedural Requirements*

2.1 Revision Procedures

Article 48(1) TEU distinguishes two amendment procedures; the ordinary and the simplified revision procedure. The ordinary revision procedure existed already before Lisbon and had replaced the different ways original treaties could be amended.^{2 3} After consulting the European Parliament, the Commission and in certain cases the European Central Bank, the Council can call for an intergovernmental conference by simple majority. After the conference, the proposed amendments will be subject to ratification in accordance with the constitutional requirements of the respective member states.⁴ Any other revision procedure must be assessed in the light of the ordinary procedure since the criticisms have been exclusively directed at the simplified but not the ordinary revision procedure.

With the Lisbon Treaty, two more procedures were introduced which are both known from the constitutional treaty.⁵ Both are subsumed under the heading of simplified revision procedures⁶ and will be the main subject of the paper. The first simplified revision procedure, which was under the constitutional treaty also known as the mixed

² e.g. Lenaerts *et al*, *Constitutional Law of the European Union*, (Thomason, Sweet & Maxwell 2005), Page 342, Reprinted 2009, Page 342.

³ Former manners of amendment as stipulated in articles: Art. 96 ECSC, Art. 236EEC and Art. 204 EAEC.

⁴ Art. 48(2)(3)(4) Treaty on European Union hereinafter referred to as TEU.

⁵ Constitution of the European Union, Art IV-444 and Art. IV-445.

⁶ Art. 48, Sub-heading between paragraph 5 and 6.

self-reform procedure^{7 8} and the second, the *passerelle*. The simplified revision procedure provides for amendments of the Treaty. After consulting the European Parliament, the Commission and in certain cases the European Central Bank, the European Council can propose the amendments which are then, as in the ordinary revision procedure subject to ratification of the member states in accordance with their constitutional requirements.⁹ Known as *passerelle* is the tool to change the legislative procedure for specific provisions and measures in the Treaty. The council has to vote unanimously in favour of a change from any legislative procedure to the ordinary legislative procedure. After the unanimous vote, national parliaments can object within a period of six months.¹⁰

2.2 Scope of the Procedures

Two aspects are crucial in determining the scope of the provisions: Restrictions as to the provisions that can be subject to amendments, and restrictions as to the content of the amendments. It has to be emphasized that either of the new procedures are very limited in the scope to which they apply in contrast to the non-limited ordinary revision procedure. The simplified revision procedure is limited to Part Three of the TFEU on internal policies and action of the Union. As the German Constitutional Court pointed out, Part Three comprises 172 articles with various sub-paragraphs.¹¹ Furthermore, it is restricted in content, stating that an amendment under this procedure must not increase the powers of the Union. The *passerelle* is limited in scope and content since it cannot amend any provision that does not provide for a legislative procedure and the amendment of the provision must not go beyond a change of the legislative procedure i.e. the actual content must not be changed. In addition, the content is subject to a second limitation, stipulating that the *passerelle* must not be used in areas with military implications or the area of defence.

2.3 Procedural Requirements

Each procedure has its own procedural requirements. In the ordinary revision procedure, the European Commission, the Member States or the European Parliament make proposals which are then referred to the European Council by the Council. Following the non-binding consultation of the EU institutions, the European council can call for an intergovernmental conference with a simple majority.¹² Proposals adopted by the IGC

⁷ Dr. Mariola Urrea Corres, *The new Treaty Revision Procedure and Entry into Force of the Constitutional Treaty*, 2007. This paper is part of a wider monographic work. Some of the reflections that it contains, especially those concerning the process by which the Treaty establishing a Constitution for Europe will come into force, are still at an embryonic stage. The work carried out by the German presidency – in particular the report which it will submit in June 2007 - will undoubtedly have a bearing on certain conclusions which could not be properly reached at this stage.

⁸ Hereinafter referred to as 'simplified revision procedure'.

⁹ Art. 48(6) TEU.

¹⁰ Art. 48(7) TEU.

¹¹ BVG judgement paragraph 311. Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html. (last visited on 08 December 2010).

¹² Hereinafter referred to as 'IGC'.

must then be ratified by the member states. Thus, a tacit approval does not suffice, as a positive ratification in accordance with the constitutional requirements of the member states is necessary.¹³

The simplified revision procedure has similar requirements. The European Commission, Member States or the European Parliament can submit proposals to the European Council, erasing the Council from the initiation procedure. The European Council can then adopt proposals by unanimity after having received the non-binding consultation by the respective institutions. Such a proposal has to be actively ratified by all member states. Here as well, tacit consent is not sufficient.¹⁴

The *passerelle* procedure requires unanimity in the European Council as well as a binding consent of the European parliament given by majority. The decision is then subject to objections by the European parliaments for a period of six months. Tacit consent is, however, sufficient and an active approval is not required.¹⁵

3. *Democratic Value of the new Simplified Revision Procedures*

3.1 The German Constitutional Court on the new Procedures

In 2009, the German Constitutional Court, the *Bundesverfassungsgericht*, assessed the compatibility of the Lisbon Treaty with the German constitution, the Basic Law. The court was especially interested in scrutinizing whether or not the transferral of power from the German executive and legislative to the European Union is constitutional. The Constitutional Court's and the applicants' major concern was the undermining of the democratic principle and the rule of law in Germany as laid down in article 20 German Basic Law.^{16, 17}

The German Constitutional Court argued that the German people are entitled to 'democratic self-determination, to free and equal participation in the state authority'¹⁸ and followed that 'without the free and equal election of the body that has a decisive influence on the government and the legislation of the Federation, the constitutive principle of personal freedom remains incomplete.'¹⁹ Therefore, a transfer of power is only possible in so far as a certain degree of sovereignty is ensured, the German legislator is not deprived of its major competences and integration does not result in a loss of identity.²⁰ It argues that the amount of transferred powers must coincide with the degree of democratic legitimation provided by the European Union²¹ and that the degree of democracy in the European Union as a supranational actor is not yet sufficient to fulfil the requirements of

¹³ Art 48(2)-(5) TEU.

¹⁴ Art 48(6) TEU.

¹⁵ Art. 48(7) TEU.

¹⁶ Basic Law of the Federal Republic of Germany [Grundgesetz], article 20.

¹⁷ BVG judgement paragraph 100ff, 311. Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html. (last visited on 08 December 2010).

¹⁸ Ibid, paragraph 208.

¹⁹ Ibid, paragraph 210.

²⁰ Ibid, paragraph 228.

²¹ Ibid, paragraph 263.

the Basic Law.²² Thus, the mandate to transfer power still lies with the member states.²³ In addition, the court has argued that the transferred power must not include a 'competence to competence'²⁴ meaning that the Union is strictly limited in its ability to extend its own competences without member states' consensus: It must be sufficiently comprehensible how far competences have been and will be transferred.²⁵

Considering this interpretation of the basic law and its democratic principles, the German Constitutional court interprets the ordinary revision procedure as adhering to the usual manner of international treaty making.²⁶ The simplified revision procedures however, are viewed very critically. The Constitutional Court clearly emphasizes that the requirement of ratification is still the same as for the ordinary revision procedure²⁷ and that there is a clear limitation in content and scope of the possible amendments. It also points out that the limitation on part 3 of the TFEU still comprises 172 statutes that possibly interfere with essential policies of the Federal Republic of Germany. The development of this competence as to the expansion of its own competences is hardly foreseeable²⁸ and therefore at the verge of being compatible with the principle of foreseeable integration as mentioned above. It is also emphasized that the restriction that no new competences can be conferred by this procedure, is the only limitation to the procedure as regards content.²⁹

More than the simplified revision procedure, the *passerelle* has been seen as especially clashing with the Basic Law. This reasoning is based on the loss of influence on external and internal matters when a legislative procedure is changed to qualified majority voting.^{30 31} This is especially significant for Germany since they are under-represented in the current QMV system. It is argued that this loss of influence must be foreseeable in each specific case in order to meet the conditions for a transfer of power.³² The requirement of unanimity in the European Council's voting upon the *passerelle* would not sufficiently ensure the requisite of foreseeability, due to the fact that it cannot be assumed the individual representative would always understand and correctly assess the magnitude of a change of the legislative procedure.³³ And the last safeguard, the right of every national parliament to veto the *passerelle*, is also considered insufficient. According to the Constitutional Court's reasoning such amendments must be positively ratified as they will otherwise not be in accordance with the Basic Law. The conscious transferral of powers must be guaranteed.³⁴

The July 30th 2009 decision on the Lisbon treaty provides a great insight into the interrelation between it and national constitutional requirements concerning its

²² Ibid, paragraph 276ff.

²³ Ibid, paragraph 231.

²⁴ Ibid, paragraph 233.

²⁵ Ibid, paragraph 236ff.

²⁶ Ibid, paragraph 307.

²⁷ Ibid, paragraph 312.

²⁸ Ibid, paragraph 311.

²⁹ Ibid, paragraph 311.

³⁰ Hereinafter referred to as QMV.

³¹ BVerfG judgement paragraph 311. Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paragraph 318, available at http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html. (last visited on 08 December 2010).

³² Ibid, paragraph 318.

³³ Ibid, paragraph 318.

³⁴ Ibid, paragraph 319.

democratic compatibility. Not only the German Constitutional court, but others as well, have critically analysed and found fault with the treaty. Among these was the European Union Committee of the House of Lords, who also noticed an implicit threat to democracy within the new procedures. Even though their conclusion differed from the one its German counterpart gave, they noted:

“Nonetheless, of all of the issues raised in submissions to this inquiry by members of the general public, the simplified revision procedures were mentioned most frequently. Mr J A Wheatly considered this the treaty's “most dangerous aspect for any democracy”. Christopher Mowbray called it “a political ‘open cheque’”.

The assessment of the position that the German Constitutional Court has taken will follow in Chapter V.

3.2 The Flipside of the Coin

The German Constitutional Court is commonly known to apply high standards to ensure the principle of democracy. That being said, the Lisbon Treaty has been assessed in light of the German Basic Law and the very strict principles applied by the Constitutional Court. The flip side of the coin will be discussed on the next pages.

The procedures were included in the treaty in order to enhance efficiency. It has been subsequently emphasized that the advantage of the procedures lies in the removal of IGC's from the procedure, rather than in a referral of actual competences to the EU. Thus, the procedural changes are emphasized rather than the transferral of powers. The Coalition for the Reform Treaty argued:

“There is a widespread sense among politicians, officials and commentators that in recent years too much time has been devoted by the Union to the discussion of institutional matters. The simplified procedure for limited revision of the European treaties reflects this concern. If in future the member states decide unanimously that they wish to introduce qualified majority voting into stipulated policy areas now covered by unanimous voting procedures, they will be able to do so without convening a special intergovernmental conference.”³⁵

Furthermore, it is pointed out by the Coalition for the Reform Treaty that the 'competence-competence' as mentioned by the German Constitutional Court is not affected. The new revision procedures are not self-amendment powers conferred to the EU and the right to veto any amendment will continue to exist.³⁶ The House of Lords points out in its assessment of the Lisbon Treaty that the veto right remains in existence and an amendment cannot be implemented against the will of the British parliament.³⁷

³⁵ CRT Briefing on the Reform Treaty – EU institutions, section 8 – Simplified Revision Procedures, available under http://www.euromove.org.uk/fileadmin/files_euromove/downloads/CRT_Briefing_on_EU_institutions.pdf.

³⁶ Ibid.

³⁷ House of Lords, European Union Committee, Tenth Report, Session 2007/2008, Chapter 3, Conclusion 3.15, 3.16.

When looking closely at the revision procedures and the way in which national parliaments are involved and can exercise a veto, the question arises about the magnitude of the threat as mentioned by the constitutional court of Germany. The simplified legislation procedure comprises effectively the very same two stages of approval as the ordinary legislation procedure and does not fundamentally alter the amendment procedures.³⁸ An amendment must be approved by representatives of the Member state (in the European Council) as well as by the parliaments of the member states. The *passerelle*, considered to be the most intimidating threat to democracy in the Lisbon Treaty, goes even further. A *passerelle* must be approved on three levels; the European Council, the European Parliament and the member state's parliaments. As Dr. Mariola Urrea Corres correctly pointed out, this effectively establishes a double veto for the member states.³⁹ Corres goes even further when questioning the effectiveness of the entire measure:

*“The existence of so many hidden vetoes calls into question the true scope of the effectiveness of the reform in a European Union of twenty-seven or more Member States.”*⁴⁰

Considering this entirely obverse evaluation of the provision the question arises whether the value of article 48 TEU is low not due to its inherent threat to democracy but due to its lack of efficiency.

4. Evaluation

In the light of these evaluations we need to look once again at the judgement of the German Constitutional Court. The Constitutional Court's critical view of the procedures seems at odds with the various veto possibilities the countries have. One must keep in mind however, that the German Constitutional Court did not find the Treaties generally, nor the simplified revision procedures specifically, unconstitutional. The ruling merely claimed that the legal framework in Germany must be amended in order to ensure a strengthened parliamentary position that ensures democratic legitimation of any act conducted under article 48 TEU.⁴¹ Phillip Kiiver, for example, argues it would be an abnormality for a constitutional court to confirm such copious amounts of new laws without conditions or restrictions.⁴² Nonetheless, he argues that the decision was of a conservative nature as no other country calls for the active ratification of a *passerelle*.⁴³ The reason for the courts conclusions seem to be based on a deep mistrust towards not only European institutions but also its own national institutions. This mistrust seems to be

³⁸ Dr. Mariola Urrea Corres, The new Treaty Revision Procedure and the Entry into Force of the Constitutional Treaty, 2007, p. 23-26.

³⁹ House of Lords, European Union Committee, Tenth Report, Session 2007/2008, Chapter 3, Conclusion 3.15, 3.16.

⁴⁰ Dr. Mariola Urrea Corres, The new Treaty Revision Procedure and the Entry into Force of the Constitutional Treaty, 2007, p. 23-24.

⁴¹ Philipp Kiiver, German Participation in EU Decision Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures, 10 German Law Journal 1287-1296 (2009), page 2, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1162>.

⁴² Ibid, page 2.

⁴³ Ibid, page 2.

threefold: First, the Court does not trust in the European Parliaments to be a sufficient and satisfactory check against the Council. Here, it emphasizes the undemocratic legitimacy of the European Union. Kiiver concluded:

“Nevertheless the Court, after declaring the European Parliament to be ill-equipped to solve the Union’s democratic deficit in more general terms, holds that national legislative ratification is indispensable. This means that the European Parliament is trusted neither to act as a check on the European Council (arguably it does stand to win from expanded EU competences) nor, and this is in fact rather more painful, to democratically legitimize the use of the relevant clauses through its consent.”⁴⁴

Secondly, the court deems the veto in the council insufficient. It does not trust the individual council representative to be able to always understand the constitutional consequences of the decision.⁴⁵ Third, and most importantly, the court does not even trust its own legislature. Instead of leaving it to the bicameral parliament to check decisions taken by the government in the council, it orders that according to national law a positive ratification of any of these acts is necessary.⁴⁶

While it is unclear and for the purposes of this paper, irrelevant, whether the German mistrust is rooted in its past, it is important to note the uniqueness of the German position. Other national courts did not find the same faults in the procedures. For example, the House of Lords stated that any amendment procedure, such as the *passerelle* is subject to 'veto by each national parliament, exercisable within six months. These vetoes are written into the Treaty and are independent of government.⁴⁷ In addition, neither the Dutch court in its advisory opinion on the treaty⁴⁸ nor the Czech⁴⁹ or the Polish⁵⁰ court had any fundamental objections against article 48 TEU.

Contrary to the position of the German Constitutional Court other voices have been raised, claiming the unprogressive and inefficient nature of the procedures. Professor Damien Chalmers as quoted by the House of Lords, anticipates that the procedures will hardly ever be used because of the hurdles inherent in the procedural requirements.⁵¹ From a European integrationist point of view, it can be argued that a ratification of the Lisbon treaty also implies the ratification of any possible future amendments as provided

⁴⁴ Ibid, page 5.

⁴⁵ BVG judgement paragraph 311. Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paragraph 318, available at http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html, (last visited on 08 December 2010)

⁴⁶ Philipp Kiiver, *German Participation in EU Decision Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures*, 10 German Law Journal 1287-1296 (2009), page 5, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1162>.

⁴⁷ Ibid.

⁴⁸ Opinion of 15 February 2008, published in *Kamerstukken II* 2007/08, 31 384 (R 1850), no. 4.

⁴⁹ Nález Ústavního soudu čj. 19 / 2008 / Sbírka nálezů a usnesení Ústavního soudu. Pl. US 19/08, Nov. 26, 2008,

available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

⁵⁰ Decision of 10 November 2010 available at <http://www.trybunal.gov.pl/index2.htm>.

⁵¹ House of Lords, European Union Committee, Tenth Report, Session 2007/2008, Chapter 3.13.

for and limited by article 48.⁵² As such, parliamentary interference should be restricted to a minimum in order to enhance institutional efficiency.

5. Conclusion

In its judgement on the Lisbon Treaty, the German Constitutional court expressed serious doubts about the simplified revision procedures. The court expressed concerns about the controllability of power and the foreseeability of further European integration, pointing out the threat it poses to Germany's democratic nature. Following a close scrutiny of the new revision procedures, one must conclude that the danger of article 48 TEU enabling unlimited integration and obstructing democratic legitimacy is rather insignificant. Even though the *passerelle* does not include a positive approval of amendments, it must be concluded that under this procedure, member states still hold a double veto right that limits the Union's ability to arbitrarily expand its competences. Furthermore, restrictions as to scope and content of the amendments under this procedure, make abuse or excessive use rather unlikely. In addition to that, many experts believe the *passerelle* to be an insubstantial instrument. Thus, the magnitude of the provision is in no sense extraordinary, and does not constitute a significant danger to democracy. Such a viewpoint is confirmed in the ruling of the *Bundesverfassungsgericht*, which deemed it constitutional. Even the very critical German Court concluded that with certain domestic safeguards the procedures do not threaten democracy or the sovereignty of the member states.

One of the main underlying concerns of the national courts is the so-called 'integration by stealth', during which the EU is granted the right to amend their own treaties without proper ratification by the member states, thus enabling the Union to obtain more competences in a hidden and secretive manner. However, this danger of a secretive competence enlargement is arguably too insignificant to make an impact. Article 48 (6) and (7) strictly limit the content and scope of the 'competence to competence' application. Considering this, all amendments under one of the procedures could be considered to be already legitimized by the initial ratification of the Lisbon treaty. It remains to be seen if this view can be taken for all future amendments that will be implemented by simplified revision procedures. Nonetheless, it does not change the fact that the danger of the procedures is rather insignificant.

Solely assessing the potential danger of a provision, provides an incomplete evaluation however. In the end, a complete assessment requires a juxtaposition of both the advantages and disadvantages. For example serious misgivings in regards to the efficiency of the provisions exist. Many actors have various possibilities to immediately stop a revision procedure. In a Union consisting of 27 member states or more, it is difficult to determine whether or not the provision is of any practical value.

Thus, it remains to be seen, whether or not the German ruling was motivated by a very strict approach to checks and balances by EU critical judges⁵³ or if it is a prudent

⁵² Philipp Kiiver, *German Participation in EU Decision Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures*, 10 German Law Journal 1287-1296 (2009), page 6, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1162>.

approach towards a steady European integration, in which the member states are safeguarded against EU encroachment. It can, however, be concluded that neither of the simplified revision procedures seriously undermine the authority of the member states.

⁵³ Theory has been discussed unscientifically in a newspaper article available at: http://www.zeit.de/2005/25/Papier_2fdi_Fabio.

DOUBLE LEGAL BASIS – IDENTICAL PROCEDURES VERSUS COMPATIBLE PROCEDURES

Thomas Hoekstra

Abstract: With the growth of the European Union, the legislative system has become more and more important, shifting the focus from consensus to legal basis and redefining the balance of power in the EU. With the growth of policy areas, however, the coherence and overlap between separate legal bases grew as well. Double legal bases were necessary to implement measures that have multiple aims, one of which not being incidental. The rise of legal basis, however, had everything to do with the balance of power. In asserting the double legal bases, the balance of power requires a strict application of the double legal bases-doctrine as laid down by the European Court of Justice. Once accepted, the balance of powers may not negatively affect the European Parliament.

1. Introduction

The European Union today is a vast organization with a budget over 120 billion Euros.¹ The influence of the Union have for a long time expanded beyond coal and steel. An 'archipelago'² of legal bases arose, giving the European Union more and more competences. In addition, no longer six, but twenty-seven Member-States and nearly 500 million EU-citizens have to be taken into account in the process. We are long past the Luxembourg-accords and legislation can be passed against the will of Member States in cases of Qualified Majority Voting (QMV). The European Parliament (EP) has gained powers to veto legislation in the co-decision-procedure. On the whole, rather than consensus, balance of power has become essential in the European legislative process. With this the basis of power has become more important, as well.³ The legislative powers of the European Union can be found in legal basis-provisions throughout the treaties. Rather than provisions that provide a straightforward and clear legal basis for legislation, the archipelago of legal basis-provisions sets out a map for the quest of finding, connecting and defending a strong legal basis, providing most power to the institution balancing against another institution. Once an institution has found a legal basis that suits it, it will sometimes have to deal with another institution that has chosen another legal basis. Ultimately, the European Court of Justice (ECJ) will decide on whether it is possible to use the two legal bases together or not.

¹ See in general also Van Ooik, *Keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Kluwer, 1999) (diss.)

² The term has been derived from Mr. Lamberto Dini in his contribution to the European Convention; CONV 123/02, contribution 52, p. 6.

³ Illustrative for the relative marginal importance of the legal basis in the early days of the EEG is that the University of Utrecht taught legal basis-theory, but quickly dropped it when '...docenten niet de indruk kregen dat studenten zeer enthousiast reageerden...' [teachers realized that students were not very enthusiastic] (own translation). Van Ooik, *Keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Kluwer, 1999), preface (diss.)

In this paper, I will address the question what compatible legal bases are. In order to do this I will first illustrate the basic concept of double legal basis using the case-law of the ECJ. Secondly, I will concentrate on compatible legal bases. I will shortly address the compatible double legal basis with identical procedures and then, using a case-study, I will look at the compatible double legal basis with non-identical procedures. Subsequently, I will address the rationae behind accepting these compatible double legal bases. As a further recommendation, I will shortly touch upon the issue of a uniform system within the legislative process in order to set a legal basis.

2. *Double Legal Basis: the Case-law of the ECJ*

The ECJ has been petitioned by institutions seeking action against other institutions for choosing an incorrect legal basis for a legislative act. The Court has set up a framework for dealing with the choice of legal basis. In the *Tatium dioxide*-case⁴, the Commission, backed by the EP, challenged the Council's choice of legal basis of a directive (89/428/EEG) with the effect of reducing or abolishing waste from the Titandioxide-industry. The Commission argued that the directive had effect in the environmental field, but that the main purpose was to create a fair competition in the industry, thus using the internal market-provision. The Council used the environmental-provision. The Court observes:

*“that in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors which are amenable to judicial review [...] Those factors include in particular the aim and content of the measure.”*⁵

If a measure has two or more aims, one must look at whether one of the aims is merely incidental or whether one is the main aim. If so, 'the measure must be founded on a single legal basis, namely that required by the main or predominant aim.'⁶ If a measure has two or more aims that cannot be separated without one being incidental, 'such a measure will have to be founded (...) on the various corresponding legal bases.'⁷ However, 'a double legal basis is not possible where the procedures laid down are incompatible with each other.'⁸ Incompatibility can originate from a hierarchy from the treaty, either based on specialty⁹, the intention of the legislator¹⁰, or an explicitly preferred legal basis¹¹. In addition, incompatibility can originate from practical impossibility, such as two different voting-thresholds.¹² Also, incompatibility can arise

⁴ Case C-300/89 *Commission v. Council* [1991] ECR I-2867.

⁵ *Ibid*, paragraph 10.

⁶ Case C-155/07 *Commission v. Council* [2005] ECR I-7879, paragraph 35.

⁷ *Ibid*, paragraph 36.

⁸ *Ibid*, paragraph 37. See also Case C-300/89 *Commission v. Council* [1991] ECR I-2867, paragraph 17-21.

⁹ On the basis of *Lex specialis derogat lex generali*.

¹⁰ Case C-155/07 *Commission v. Council* [2005] ECR I-7879, paragraph 47.

¹¹ E.g. when a provision reads 'without prejudices to article x'.

¹² E.g. QMV versus unanimity. See Case C-338/01 *Commission v. Council* [2004] ECR I-4829, mainly paragraph 58.

when a double legal basis is used to circumvent the powers of the European Parliament.¹³

3. *Compatible Legal Basis*

Incompatible legal bases can be easily recognized given the case-law from the ECJ, whereas compatible legal bases can be more difficult to point out.¹⁴ Compatible legal bases are opposed to incompatible legal bases. Other than the title of this paper may imply identical procedures should – if a double legal basis is justified – fall under the category of compatible legal bases. A more appropriate title would have been "identical procedures versus other compatible procedures."¹⁵ It is important to note that an identical procedure and another compatible procedure are not always allowed as double legal basis. One has to establish that there are multiple aims of the measure that cannot be separated, that one of them is not merely incidental and that both aims require another legal basis. Only in that case, one comes to the question of compatible double legal bases. And if it has been established that there is a compatible legal basis, one can characterize the compatible legal basis as an identical procedure or another procedure.

3.1 Identical Procedures as Double Legal Basis

It seems to state the obvious to point out that identical procedures are compatible if the situation arises in which a double legal basis is allowed. I would argue that only because of their privileged status, the Commission, the EP or the Council would have standing before the Court, whereas otherwise the lack of interest (e.g. no loss of rights) would have prevented them.

3.2 Non-identical Procedures as Compatible Double Legal Basis

A non-identical compatible double legal basis cannot be founded on general rules. One has to look at the specific case to establish the parties and their interests, and to see whether a double legal basis that is not identical is admissible. An example of such a case is C-178/03¹⁶. The case was submitted to the ECJ by the Commission after the European Parliament and the Council changed the legal basis for the regulation no 304/2003 from article 133 EC (now article 207 TFEU) to article 175(1) EC (now article 192 TFEU).

The regulation had a fourfold of objectives according to article 1 of the regulation: 'a) to implement the Rotterdam Convention, b) to promote shared responsibility and

¹³ Based on the principle of democracy. Case C-178/03 *Commission v. European Parliament* [2006] ECR I-107, paragraph 57.

¹⁴ Also because the lack of academic work on this subject.

¹⁵ Also the term 'double legal basis' is not completely accurate in the title and usage in this paper. 'Multiple legal basis' would be more appropriate, as more than two legal bases can be used for a legislative act. This of course, only in accordance with the rules and case-law described in this paper.

¹⁶ C-178/03 *Commission v. European Parliament* [2006] ECR I-107.

cooperation effort in the international movement of hazardous chemicals in order to protect human health and the environment from potential harm; and, c) to contribute to their environmentally sound use.¹⁷ The Rotterdam Convention provided an informed consent procedure in the field of international trade of hazardous chemicals. The fourth objective is named in the preamble. It states that in relation to article 15(4) of the Rotterdam convention, this regulation will provide for more stringent protective actions safeguarding human health and the environment.¹⁸

The Commission based its proposal on article 133 EC, arguing that the regulation focuses on regulating international trade of hazardous chemicals, thus under the scope of the common commercial policy. Notwithstanding, the Commission acknowledged that the regulation also contained elements of environmental protection, the basis used by the European Parliament and the Council. The Commission's argumentation was largely based on the titles of the section in the regulation that read 'exports' and 'imports'. Also, the Commission argues that the Rotterdam Convention – implemented by this Regulation – falls within the scope of international trade and is thus suited for the common commercial policy. The Commission also refers to the broad interpretation that the ECJ has given to the common commercial policy.

The European Parliament and the Council changed the legal basis proposed by the Commission from the common commercial policy to environmental policy, using the co-decision procedure (now: ordinary legislative procedure). The EP and the Council were supported by France, Finland and the United Kingdom. Other than under the common commercial policy-article of 133 EC which does not provided for formal participation of the EP, article 175(1) EC provides for a co-decision procedure with QMV in the Council.¹⁹ The arguments of the European Parliament and the Council are based upon the proposition that the effects for the trade (e.g. restricting trade, confirmed consent procedures and packaging and labelling requirements) are only evidence of the importance that the regulation lays upon the protection of the environment. In addition, the European Parliament and the Council rely upon the text of the objectives named in the regulation²⁰, where it mentions the protection of human health. The enhanced mechanisms for enforcing protection in the context of article 15(4) of the Rotterdam Convention are also indications of the main aim of this regulation, according to the EP and the Council.

The Advocate-General Kokott concludes incompatibility of article 133 EC and article 175 EC. He takes a rather strict line, arguing that because of article 175 EC providing for the co-decision procedure, the powers of the parliament are so enhanced that the procedures are fundamentally different and cannot be compatible.

The court decides differently. It first assesses that the regulation has multiple aims (environmental protection and the common commercial market), of which one is not merely incidental and both are inseparably connected. A double legal base would be in order if the legal bases are not incompatible. The Court reasons that the Parliament rights are not circumvented by using article 175 EC in addition to article 133 EC. This does not come as a surprise, because it was the parliament together with the council that

¹⁷ Ibid, paragraph 4.

¹⁸ Ibid.

¹⁹ Ibid, paragraph 58-59.

²⁰ Art. 1(1)(c) of the contested regulation. To be found in C-178/03 *Commission v. European Parliament* [2006] ECR I-107, paragraph 4.

used this article. The court also considers that the Council's rights are not affected because under both articles the council had to vote with a qualified majority.

The court therefore has provided a compatible double legal basis with non-identical procedure.

4. *Rationae of Double Legal Basis*

Double legal basis in general is based upon a practical necessity. EU measures should be coherent and regulate a field of society effectively. That the EU treaties do not always provide proper legal basis for such a measure in one provision complicates matters, but does not play an important role in the philosophy of law-making.

It is important to notice the strict rules the ECJ has laid down regarding double legal basis. Not only will a double legal basis be not accepted absent a measure that has multiple aims, not to be separated and one not merely incidental to the other, it is difficult to find a compatible double legal bases. This has everything to do with the balance of powers. A too loose legal-basis game would give opportunity for the institutions to always pick the legal basis most generous to them.

Looking at double legal basis with non-identical procedures, as seen from the case-study above, the Advocate-General and the Court have a different opinion as to what qualifies as a compatible double legal basis. The Advocate-General seems to reason to a point where only identical procedures qualify as a compatible double legal basis.²¹ This rather strict and formal approach to the legislative process is appealing. It would lead to a clearer field of double legal basis. However, the European Union is – different from the United States – not a set union with a clear constitutional structure.

The ECJ takes a more substantive (and with that maybe a more political) approach. It looks at the parties involved and whether the interests of the parties in these cases are equally divided. Other than the A-G, the Court does not see it as a problem that the European Parliament gets more power by using article 133 EC. The Courts notes that a double legal basis that would negatively affect the European Parliaments powers is incompatible, however, a positive implication does not seem to upset the legislative process too much to annul the measure in this case.²² I think this should be understood with regard to the 'attachment to the principle of (...) democracy.'²³

²¹ In its opinion the A-G notes in paragraph 63: 'Because of the incompatibility of the legislative procedures provided for in Article 133 EC and Article 175 EC, the Community legislature would thus, even if there were taken to be a balance between environmental and commercial policy aspects in the Regulation, still have had to give priority to one of the two legal bases. In view of the incompatibility of the procedures, it would not have been able to base the Regulation on the common commercial policy and environmental policy at the same time.' He however acknowledges that '[i]n such a situation, environmental policy would have had to prevail with Article 175 EC as the legal basis. With respect to the legislative procedure, the Parliament's right of co-decision is the norm,' because of 'the principle of transparency (Article 1(2) EU) and the principle of democracy (Article 6(1) EU) if, of two legal bases which are equally possible and equally affected but not compatible with each other, in case of doubt the one is chosen with which the Parliament's rights of participation are greater.'

²² C-178/03 *Commission v. European Parliament* [2006] ECR I-107, paragraph 57, 59.

²³ Preamble to the Treaty on the European Union. See also art. 6(1) TEU.

5. *Uniform System of Setting the Legal Basis*

The current situation of litigation after the legislative procedure has finished is not ideal. Ideally, problems between the actors in the legislation process will be dealt with during the legislative process. A uniform system to choose a legal basis would prevent the current situation of litigation. Such a uniform procedure would make it possible to abolish litigation on the legal basis of a measure after it has been through the legislative process. There are roughly three different systems one could introduce: a treaty-based system, a consensus-system or an exclusive power-system.

5.1 A Treaty-based System

The treaty-based system would comprise of a general legal-basis for EU measures. At the moment, such a system is politically unachievable, because it would practically mean the creation of the United States of Europe. However, with just one general legal basis for EU measures²⁴, no double legal basis-problems would arise.

5.2. A Consensus System

The consensus-system will use a consolidation-committee from the European Parliament, the Council and the Commission if disagreement arises regarding the legal basis of an EU measure. All EU measures will be tabled for consideration on the legal basis for a period of time. During this period, the EP and the council can disagree with the commission's proposal of legal basis. If such a disagreement is called, a committee convenes to discuss the disagreement and to propose a new legal basis in order to amend the proposal or withdraw the proposal. The committee would have to deliver a unanimous decision. The main advantage of this system would be that the legal basis of legislation would then be a more political decision, rather than a stringent judicial review on a formal basis. However, the unanimity required to keep the balance of powers from toppling over is not easy to achieve.

5.3 An Exclusive Power System

This system would allocate the power to set a legal basis to one institution. This would have to be the Commission, because they have the sole power of initiative. The measure can only be adopted on that legal basis. The legal basis is not to be challenged in court on other grounds than lack of competence. This system would make the commission a very strong player in the legislative process. One can therefore also think about introducing more accountability for the commission to the parliament and the council (e.g. an individual motion of censure).

²⁴ That can be subject to a competence-list.

6. *Conclusion*

The double legal basis is illustrative to the European Union's rather unstructured constitutional set-up. As the Union grew over time, legal bases have grown more and more important. Confronted with the problems of the double legal basis, the ECJ took – in my view – a two-sided approach: 1. it has laid down strict rules concerning the acceptance of a double legal basis and the categories of incompatible legal bases, but 2. it has taken a rather more political or substantive approach in accepting double legal basis if compatible.

With the second part of the approach it remains somewhat unclear how to characterize a double legal basis that has non-identical procedures. One element is clear; the Court does not take a strict approach but will give way to for example a more powerful EP using a double legal basis. On the other hand, a double legal basis cannot infringe upon the EP's powers. With this the democracy-principle gets a prominent place in the double legal basis-doctrine.

The double-legal basis doctrine poses a non-ideal situation of legislative process. I have made some recommendations for systems that can confine the double legal-basis discussion within the legislative process, rather than letting a court decide.

INCREASING EU DEMOCRACY: POWER TO THE EUROPEAN PARLIAMENT OR POWER TO NATIONAL PARLIAMENTS?

Anja Greenshield

Abstract: Much of the criticism voiced about the European Union deals with its alleged lack of legitimacy and democratic deficit. In order to increase the accountability of the Union towards the peoples of Europe, it is proposed that a higher level of involvement in Union matters and its decision-making process would help to solve this problem. An analysis of ways and possibilities for the citizens of Europe to take part in the institution's activities is therefore of importance, as well as an evaluation of this involvement regarding how direct, straightforward and accessible it is. These activities have been altered substantially through the entry into force of the Treaty of Lisbon in December 2009 and deserve special attention. A conclusion will be made as to the choice between the national parliaments or the European Parliament as the most desirable way to enhance citizen's involvement in European affairs and thus augment the European Union's legitimacy towards its people.

1. Introduction

“Desiring to enhance further the democratic and efficient functioning of the institutions so as to enable them to better carry out, within a single institutional framework, the tasks entrusted to them.

Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.” – Preamble to the Treaty on European Union”

Fifty-three years after the six founding members of what would become the European Union signed the Treaty of Rome, only its fundamental principles remain. Amending it to comply with the need of modern society, in a European Union with more than four times the number of members it started out with, the current Union has more power and influence than the founding fathers could have ever imagined. Of the goals set out in the preamble of the original Treaty of Rome, as well as in its current version after many amendments in the Preamble to the Treaty on European Union, the aim of including the people has been among the hardest to accomplish.

The European Union has been continuously criticised for its lack of democracy and legitimacy. Democracy, the “rule of the people”, is argued to be achievable only when the people of Europe are more involved in the matters of the Union and its decision-making process.

In the following, I will examine whether the national parliaments or the European Parliament should be empowered in order to increase the involvement of the European Union's population. In order to do so, I will first discuss the problem of the Union's

legitimacy and democratic accountability as such. I will continue by analysing in which way the people of Europe are currently included in the decision-making processes and other important activities of the Union. Since the Treaty of Lisbon introduced significant changes only one year ago, most amendments have not been covered by the current literature and require individual scrutiny. The various ways for the people of Europe to be involved in EU institutions must be evaluated in the next step, so that one can reach a conclusion as to which organ(s) should be empowered in the future. The last step is to assess the possibilities for improving citizens' ways of participation in the European Union.

The research methodology employed will be an inter-disciplinary approach, looking at a mixture of primary sources, i.e. the Treaty of Lisbon in particular, as well as literature on the democratic deficit and related aspects of the European Union.

2. *Debates on Democracy and Legitimacy*

Before analysing the way in which citizens of the European Union could become more involved in its internal actions, the current problem areas must be analysed and illustrated. It must also be stated that the proposed problem of legitimacy is far from consistently affirmed by all scholars.

Authors like Giandomenico Majone and Andrew Moravcsik have suggested that the problem of legitimacy is non-existent. Their reasoning is that the decisions taken at the level of the European Union are not of the wider population's interest; therefore the fact that some argue that these decisions are concluded undemocratically is irrelevant. They put forward that all legislation that is 'important' to the largest part of the people is still part of their home country's sovereign power, such as health, security and education.¹

Other scholars have proposed that the discussions on democracy in the European Union are superfluous because "pure" democracy is fiction and does not exist in any nation-state. "Real democracies are hybrid constructions" and this is most certainly also applicable to the European Union, they argue.²

Recently, some research has gone even further by suggesting that the European Union even helps to solve "structural democracy failures of the national states".³ On the other hand, an overwhelming body of evidence exists for the contrary, some of which will be examined in the following. For the largest part of the Union's population, the Union lacks legitimacy and democratic accountability. Indicators for such views are visible in the current editions of the Euro barometer, an inquiry into the public opinion of the people of Europe. When asked about possible improvements, the wish for "enhancing the dialogue between the European Union's citizens and institutions" was voiced by 37 % of the persons in its latest edition as the most common concern.⁴

¹ J. Snell "European Constitutional Settlement", an ever closer Union, and the Treaty of Lisbon: Democracy or Relevance, 176. *European Law Review* 2008, 33(5) 619-642, pp 619.

² L. Giorgi Democratization and the European Union in L. Giorgi, I. von Homeyer, W. Parsons (eds.) *Democracy in the European Union: towards the emergence of a public sphere* (Routledge, New York 2006), pp 34.

³ C. Joerges Integration through De-Legalisation?, 11. *European Law Review* 2008, 33(3), 291-312, pp 302.

⁴ Eurobarometer 72, Vol. 2 2010, pp 204; available at: http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_vol2_en.pdf (last visited 21/04/2011).

Another indicator for people's discontent with the current situation can be seen by merely looking at the outcome of the latest parliamentary elections from May 2009. In comparison with the overall election turnout throughout the years since its establishment in 1979, the European Parliament has never seen such a low level of voter participation. Even though countries like Belgium have remained at the same high level for years, i.e. roughly 90 %, participation drops as low as 37 % in other countries. Germany experienced a particularly high drop down to roughly 42 %, which is critical due to the fact that it is by far the country with the largest community of voters in the Union. This led to the overall turnout being at an all-time low at 43%.⁵ Therefore, a lack of interest in, or support for, the Union can be observed. Part of the reason behind this is most probably the aforementioned legitimacy problem of the European Union, as well as criticism of the missing democratic accountability of the Union towards its citizens in fundamental matters.

As a new feature of the amended Treaty on European Union, an entire chapter is dedicated to increasing democracy, namely "Title II Provisions on democratic principles", including Articles 9 to 12 TEU. This is an important step in working against the alleged democratic deficit of the Union. It starts by addressing the citizens and guaranteeing European citizenship in addition to national ones. This provision is important due to its symbolic value towards unity across all European people. The next article stipulates, amongst others, that the European Union is a representative democracy and that citizens should be represented through the European Parliament. The aim of achieving more transparency and increased information flow between the institutions and citizens is laid down in Article 11 TEU. Article 12 enumerates all of the functions which national parliaments now have within the workings of the Union. Therefore, these articles are of profound importance for the Union in order to achieve its goal of increasing its legitimacy towards the people of Europe.

3. *Citizen Involvement*

In order to assess the Union's perceived problem of legitimacy, one must examine in which exact way the population of Europe is involved in the Union's decision making process. Hereby especially the changes since entry into force of the Treaty of Lisbon on 1 December 2009 will be taken into account. All organs participating in the decision making process will be reviewed.

There is no way for a citizen of Europe to directly participate in legislative processes. Referenda do not exist at the European level. The closest a citizen can get to being involved is through the European Parliament. This is elected in direct universal suffrage for five years.⁶ Like in most parliaments in the Member States, this is the most concrete way a citizen can participate in their country's legislative process, relying on their elected party to best represent their interests in parliament. The same is true for the European Parliament, but nevertheless it has been argued that no comparison between it and the national parliaments is possible. This argument is based on the fact that the

⁵ For an overview over the elections of May 2009, see: http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout_en.html (last visited 21/04/2011).

⁶ Article 14, Treaty on European Union (hereafter referred to as "TEU").

European Union does not function in the same way as the democracies throughout Europe. The Parliament is not the main legislator and does not have the same substantive say in the entire legislative process as a national parliament comparably does.⁷ The European Union is not one super-state with the Member States as its federal subunits. Therefore, a more complex system of legislating must be employed. This in turn is argued to be undemocratic, precisely because the European Parliament is the only elected European organ and for a long time has not been (and is still sometimes said not to be) the driving force behind the decision making process.

The European Parliament is not the only organ through which inhabitants of the Union are supposed to receive a voice. In several other instances, the Member States are represented at a Union level through their government or ministers.

The Council is the most important representation of the Member States, given that it is comprised of ministers of the respective national governments. The national governments are democratically elected organs in their home country, and therefore represent their voters. Through the Council, the people of Europe can indirectly participate in the Union's decision making process and the Council's other fields of operation.⁸

The European Council consists of Heads of Government or Heads of State of the Member States. Depending on how they are elected, either directly or indirectly through parliamentary elections, the involvement of the population increases. It can generally be said that this is not the most straightforward way of including the people.⁹

The members the Commission are chosen because of their qualifications from the people of the Member States. They are explicitly independent from national governments and are forbidden to have any connection to other institutions though one Commissioner is chosen for each Member State.¹⁰ The involvement of the people in the European Union is therefore not increased by the Commission.

In conclusion, the citizens of the European Union are clearly involved in the European Parliament. They are also included in setting up the Council and the European Council to a lesser extent. Therefore, it must now be examined in which way each of the above mentioned organs participate in the decision-making and the general EU processes, in order to fully assess the citizen's actual participation in it.

4. *Decision-making*

The European Parliament's role in the legislative process has changed substantially throughout the years. Since its establishment in 1979, its responsibilities have been increasing gradually. Throughout the 1980s the awareness of the people as to their say in European decision-making has grown. Important treaties like the Single European Act

⁷ Article 294, Treaty on the Functioning of the European Union (hereafter referred to as "TFEU").

⁸ Article 16 TEU.

⁹ Article 15 TEU.

¹⁰ Article 17 TEU.

and especially the Treaty of Maastricht contributed to European Parliament's power being augmented.¹¹

The Treaty of Lisbon is an important step in increasing the Parliament's influence in decision-making, particularly emphasising augmentation in political control and consultation.¹² This is of particular importance because the Parliament is seen as the most democratic of the Union's institutions and should thereby enhance its democratic legitimacy.¹³ The codecision procedure is now the 'ordinary legislative procedure' as stipulated in Article 294 TFEU. The Parliament is on the same level as the Council in the decision-making process and a veto is granted to it. Due to the elimination of the third pillar, dealing with policing and justice, the Parliament has been given the competence to legislate over these matters, as well as issues dealing with the Common Agricultural Policy, the fisheries policy, over 40 other areas and increased power in Treaty amendments. The goal of increasing the European Parliament's power is to raise the democratic accountability of the European Union.¹⁴ Another area where Parliament has been granted more rights is controlling the budget, where again the decision over the whole budget of the European Union must be made together with the Council. More say has been added for concluding international agreements.¹⁵

Though not in relation to the legislative process, other important changes are especially in the field of scrutiny, for example that the Commission and the new office of the High Representative of the Union for Foreign Affairs and Security Policy are accountable to Parliament and require its approval.¹⁶ The European Council must propose the President of the Commission having regard to the outcome of the elections of the European Parliament, before being elected by Parliament.¹⁷

In total, the Treaty of Lisbon has successfully responded to a demand for more democratic accountability of the institutions of the European Union as a whole. The role of the Parliament in the decision-making process has substantially increased, giving it real power in comparison to its former situation.

The Council's role according to Article 16 TEU is exercising legislative and budgetary powers together with the Parliament. Although the Parliament's competences regarding the decision-making process are considerably larger than they have ever been, the Council still remains the main legislator of the European Union.¹⁸ It plays the most important role in conducting and co-ordinating Union policies, in areas such as economic policies of the Member States, foreign and security policy, as well as concluding international agreements on behalf of the Union. The power to agree on the European Union's annual budget has been shared with the European Parliament since the Treaty of Lisbon.¹⁹

¹¹ A. von Bogdandy *A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle* in B. Kohler-Koch, Berthold Rittberger (Eds.) *Debating the democratic legitimacy of the European Union* (Rowman & Littlefield, Lanham 2007), p. 33-35.

¹² Article 14 (1) TEU.

¹³ European Union Preparatory Acts, Official Journal C 212E, 05/08/2010 p.37.

¹⁴ European Union Preparatory Acts, Official Journal C 212E, 05/08/2010 p.37.

¹⁵ *The Lisbon Treaty*, available at: <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=66> (last visited on 21/04/2011).

¹⁶ Article 17 (6-8) TEU.

¹⁷ Article 17 (7) TEU.

¹⁸ See Article 294 TFEU etc.

¹⁹ Art 314 TFEU and *The Council of the European Union* available at: <http://www.consilium.europa.eu/showPage.aspx?id=242&lang=en> (last visited on 21/04/2011).

Though the citizens of the European Union may be indirectly involved in the European Council, via representation of Heads of Government or State, no legislative power is exercised. The Council's role is to develop guidelines and general policy directions for the Union.²⁰ Therefore, it need not be examined further, as it is not relevant enough for the involvement of the population.

As a new feature to the Treaty of Lisbon, national parliaments as such are more involved in Union matters. Article 12 TEU stipulates the necessity of national parliaments for a well-functioning Union. Their job is now particularly of a monitoring nature, such as controlling the acts of the Union in terms of respecting the principle of subsidiarity, being the first to be informed about draft legislation and applications to join the Union. Additionally, they should take part in the areas of freedom, justice and security by evaluating the implementation measures, monitoring Europol and Eurojust and by "taking part in the inter-parliamentary cooperation between national Parliaments and the European Parliament."²¹ Further issues are dealt with in the Protocol on the Role of National Parliaments in the European Union, as well as the Protocol on the Application of the Principles of Subsidiarity and Proportionality. The former mainly deals with the right of parliaments to be informed about happenings within the Union. The latter stipulates the so called "yellow and orange card procedure", which is the control mechanism allowing national parliaments to object to draft legislation if they are of the opinion that it does not comply with the principle of subsidiarity. The Commission is obliged to reassess the legislation and give a reasoned opinion on it should the required number of parliamentary vetoes be submitted.²² This greatly improves the role of national parliaments standing independent from their participation in other Union organs.

There are other ways of involvement for citizens of Europe. These include the possibility of complaining about the European Union to the European Ombudsman. He or she is elected by the Parliament, hears allegations of the Union's maladministration and then issues reports on them.²³ A new process called the Citizen's Initiative is being launched, allowing citizens to collect statements on a certain topic of complaint to be formally registered with the Commission, on which it is obliged to react when the admissibility criteria have been fulfilled.²⁴

Concluding, the two easiest ways for the citizens of Europe to be involved in Union matters and the decision making process, are via the European Parliament or their respective national parliaments.

²⁰ Article 15 (1) TEU.

²¹ Article 12 TEU.

²² Article 7, Protocol on the Application of the Principles of Subsidiarity and Proportionality.

²³ Article 228 TFEU.

²⁴ *The Treaty of Lisbon- Questions and Answers*, available at http://europa.eu/lisbon_treaty/faq/index_en.htm#2 (last visited on 21/04/2011).

5. *European Parliament or National Parliaments?*

In the following it must be examined whether the European Parliament or the national parliament is best suited to represent the population's interest. These two 'routes to legitimacy' have been put forward by a number of scholars.²⁵

The choice between the two is not a simple one. By granting more power to the European Parliament, national parliaments fear a decrease in their sovereignty, though most national political parties are in principle in favour of empowering it. Enthusiasm varies throughout the Union, from high support in Germany, the Netherlands, Denmark and Belgium, to scepticism and reluctant support in the United Kingdom.²⁶ On the other hand, proposals to introduce a second chamber to the European Parliament consisting of national Members of Parliament in order to increase its democratic functioning were clearly opposed. Here, it is feared that the increase of power of national MPs would undermine the legitimacy of the European Parliament even more.²⁷

Taking into account the most recent changes to the European Institutions through the Treaty of Lisbon, most of which have not been discussed by scholars in terms of their effect of increasing the legitimacy of the Union for the people, one must come to the conclusion that their effect is enormous.

The national parliaments' power has also increased since the promulgation of the Treaty of Lisbon, as illustrated above. In the recent past, they have rarely exercised their functions and it remains to be seen whether they will do so in the future.²⁸ Comparing the national parliaments' and the European Parliament's role in the most important processes of the Union, it is debatable who has more power on the whole. The national parliaments are involved on many levels in a number of institutions of the Union, as well as on their own in a monitoring function. Therefore, one must come back to the level of involvement of the citizens.

National parliaments have the clear advantage that their people are (usually) comparably more interested in national matters than in European Union issues. They do not have the problem of legitimacy and should not lack democratic accountability. Taking this as a starting point, it seems that stronger involvement of the people via national parliaments is easier to fulfil. The reason behind this is simply that the involvement in parliament is (usually) present already and does not require any extra work in order to promote it; certainly a smaller effort is required to encourage people to vote for their national parliament than the European counterpart. Just looking at the low turnout of the elections for the European Parliament in comparison to the considerably higher voter turnout in the national parliamentary elections is a strong indicator of this.²⁹ Additionally, empowering the national parliaments would have the advantage of decreasing the

²⁵ B. Rittberger *Constructing Parliamentary Democracy in the European Union: How Did It Happen?* in B. Kohler-Koch, B. Rittberger (eds.) *Debating the democratic legitimacy of the European Union*, pp 112.

²⁶ Ibid pp 120.

²⁷ Ibid.

²⁸ J. Snell "European Constitutional Settlement", an ever closer Union, and the Treaty of Lisbon: Democracy or Relevance, 176. *European Law Review* 2008, 33(5) 619-642, pp 636.

²⁹ For a comparative overview of the turnout of national elections within the EU Member States, see Eurostat Voter turnout in national and EU parliamentary elections, available at: <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do;jsessionid=9ea7971b30dca30731e5d44646838b1f99ea16984117.e34RaNaLaxqRay0Lc3uLbNiMchyOe0?tab=table&plugin=1&pcode=tsdgo310&language=en> (last visited 21/04/2011).

Member States' sceptical attitude towards the Union. This was most recently illustrated in the Lisbon Judgment by the German Constitutional Court, declaring it compatible with the German Constitution. Part of the so-called "Kompetenz-Kompetenz" debate was that the Union's existence was only democratically legitimised by its Member States' transferral of power to it. Therefore it could not be seen as possessing an independent legal order, but rather a derivative one – quite apart from the fact that the Union was nothing more than a "long-term union of sovereign states".³⁰ Logically, if the Member States' own parliaments were to have an even bigger role in decision-making and other important issues in the Union, the opposition towards it would surely be reduced.

The advantage of empowering the European Parliament would not only be the enhanced democratic accountability, but would have symbolic value as to the creation of greater unity among the peoples of Europe. It is a fundamental difference if the main democratic driving force is an organ elected by everyone in Europe, instead of a national parliament only elected by its own nation. The European Parliament was specifically created to enhance the Union's internal democracy by allowing citizens to elect it directly. It is the only organ where this can be done by all people of Europe together. Within the Parliament, the parties do not sit according to their respective states, but political orientation, meaning that it is the only institution where nationality plays a secondary role.

What remains problematical is the lack of interest by the general population for the European Union. Legitimacy is not the only underlying reason for this; it is rather a socio-political topic beyond the scope of this paper. What can be said, though, is that the European Parliament has substantially increased the democracy within the workings of the European Union and is fundamental to its proper functioning.

6. *Conclusion*

Augmenting the involvement of the population of Europe should be done via the European Parliament in order to create a European Union that is democratically accountable and legitimate in the eyes of its citizens.

The "closer union among the people" of Europe, as laid down in the Preamble of the Treaty on European Union, can only be achieved through increasing the power of the European Parliament. The alternative solution, i.e. empowering the national parliaments, might lead to stronger support by the Member States, but would be contrary to the fundamental goals of the Union. The route via the national parliaments would just lead to a move away from the concept of a united Europe and would strengthen the claims for sovereignty among the Member States. Though this might be desirable for some, I am of the opinion that the latter solution would only lead to greater problems of legitimacy in the long run. Empowering national parliaments would therefore only be a temporary solution that is not in conformity with the idea of Europe.

Having expanded its influence, the European Parliament may legislate on the majority of the Union's competences. It would be desirable if these powers could be increased to all areas in which the Union may legislate. Adding this to the powers to

³⁰ D. Doukas The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!, 1886. *European Law Review* 2009, 34(6), 866-888, pp 871.

control and appoint members of other institutions, Parliament would have the greatest power in the Union. Whether the Member States would accept this is questionable, but in this scenario there would be no doubt about the people of Europe being highly involved in all essential matters in the Union. The question remains whether this involvement is in fact desirable and if their current influence is not greater for a reason.

NATIONAL PARLIAMENTS AND SUBSIDIARITY: TOWARDS A “RED CARD SYSTEM”?

Sam Leerschool

Abstract: In light of the scepticism concerning the European Union’s lack of democratic legitimacy, this paper analyses whether the powers delegated to national parliaments, to scrutinise EU draft legislative acts’ compliance with the subsidiarity principle (i.e. yellow and orange card procedure) are sufficiently effective. In this context the paper explores the desirability of a red card system allowing national parliaments to directly halt the adoption of EU draft legislative acts, which is not permitted under the current procedures. The latter instead allow for EU draft legislative acts to be reviewed by the respective EU institutions and accordingly be maintained, amended or withdrawn. The substantive part of the paper provides for a relatively detailed clarification of the problem at hand, the subsidiarity principle upon introduction, its expansion, points of concern and positive effects. It will be concluded that a red card procedure would largely be obsolete, since the yellow and orange card procedures arguably provide national parliaments with sufficient scrutiny. The EU’s democratic legitimacy should consequently improve.

1. Introduction

In the reality we live in, political power struggles within society have been, are and for the foreseeable future will most likely remain a matter humanity will have to deal with. History has taught us that like a chameleon this concept can take on a ray of forms, some as bloody coup d’états (which overthrow one ruthless leader but in return install a villain of similar status) whereas others permit the smooth and peaceful transition from one reasonably well-oiled government to the next.

At the end of the Second World War Europe evidently lay in ruins, but American aid (the Marshall Plan¹) helped to jump-start the economies of those European countries which sought alliance. The thought that Europe’s pitfalls had mostly been overcome, was unfortunately however a terribly mistaken one. Europe’s politicians were (perhaps rightfully so) too distrustful of Germany’s eagerness to ‘play nice’ from now on, as well as the Soviet threat from the East which by no means lay dormant, but instead grew more urgent with the start of the Cold War.²

On 9 May 1950, Robert Schuman (Foreign Minister of France) subsequently proposed the Schuman Declaration (conceived by Jean-Monnet), which was to merge France’s and Germany’s coal and steel production (as well as that of any other willing European country) under one united High Authority. Hereby not only economic integration and prosperity was to be achieved, but most decisively make war between

¹ John R. Gillingham, ‘The German Problem and European Integration’, in Desmond Dinan (ed.), *Origins and Evolution of the European Union*, (Oxford University Press, 2006), page 57.

² R.T. Griffiths, *History of the European Union*, An audio course on the origins and developments of the E.U., Home Academy, 2004.

France and Germany ‘not merely unthinkable, but materially impossible.’³ European integration was set in motion, resulting in the noteworthy inception of the ECSC, the Rome Treaties (EEC and EURATOM), the Maastricht Treaty (Treaty on European Union)⁴ and more recently the Lisbon Treaty⁵.

The ratification process of the Maastricht Treaty did not go without criticism, seen by the prolonged ratification period with Denmark initially voting against.⁶ With France’s and the Netherlands’ failure to ratify the Constitutional Treaty (2005) indisputably still strong in the minds of the national governments, all 27 Member States except for Ireland conveniently managed to bypass the duty to hold national referendums before ratifying the Lisbon Treaty (2009). With Ireland being constitutionally obliged to do so, it only obtained a positive outcome during its second referendum.⁷ With Constitutional Courts such as that of the Czech Republic furthermore scrutinising the Lisbon Treaty’s legitimacy before ratification⁸, national criticism was far from absent. A primary concern exposed by the Laeken Declaration in 2001, itself initiated to ‘revive the Union’, was that of its lack of democratic legitimacy which one can sub-divide into criticism regarding the Union’s ‘democratic deficit’ and its ‘competence creep’.⁹ Abundant literature has proven that these concerns were to a certain extent reiterated by euro-sceptics during the ratification process of the Lisbon Treaty.

As a counterbalance the principle of subsidiarity was introduced by the Maastricht Treaty¹⁰, which the Lisbon Treaty accordingly expanded upon. As a way of stemming the tide, the Laeken Declaration allocated national parliaments the responsibility to scrutinise the compatibility of EU draft legislative acts in compliance with the subsidiarity principle.¹¹ In light of residual dissatisfaction however, it should be analysed whether the ‘early warning system’¹² built around this principle is adequate or if it indeed faces valid concerns necessitating its even further expansion. Phrased differently, it boils down to whether there is a need for a ‘red card system’ providing national parliaments with the liberty to halt the adoption of the EU’s draft legislative acts.¹³

Although this paper only allows for a superficial study, the examination of multiple in-depth sources (ranging from EU Treaties and Protocols, UK’s House of Commons Scrutiny Committee to academic literature) will hopefully provide the reader with a clearer understanding of the matter at hand. To do so, the substantive part of the paper commences with a more detailed clarification of the problem faced, the subsidiarity

³ Robert Schuman, ‘The Schuman Declaration’, in Brent F. Nelsen, Alexander Stubb (ed.), *The European Union. Readings on the Theory and Practice of European Integration*, (Palgrave macmillan, third edition, 2003), page 13, 14.

⁴ Europa (Gateway to the European Union), http://europa.eu/abc/treaties/index_en.htm, visited on 02/12/2010.
ECSC: European Coal and Steel Community. Entered into force July 23rd, 1952 and expired on July 23rd, 1952; EEC: European Economic Community. EURATOM: European Atomic Energy Community. Both entered into force January 1st, 1958; The Maastricht Treaty entered into force November 1st, 1993.

⁵ Europa (Gateway to the European Union), http://europa.eu/lisbon_treaty/index_en.htm, visited on 02/12/2010.
The Lisbon Treaty entered into force December 1st, 2009.

⁶ Damian Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), page 26.

⁷ BBC News, <http://news.bbc.co.uk/2/hi/europe/6901353.stm>, visited on 04/12/2010.

⁸ BBC News, <http://news.bbc.co.uk/2/hi/8288181.stm>, visited on 04/12/2010.

⁹ Damian Chalmers, Adam Tomkins, *European Union Public Law*, (Cambridge University Press, 2007), page 59, 60, 64.

¹⁰ Susan Senior Nello, *The European Union: Economics, Policies and History*, (McGraw-Hill Education, 2005), page 6.

¹¹ European Constitutional Law Network, http://www.ecln.net/documents/sofia_2008/buch/ecln_2008_louis.pdf, page 135. Visited on 01/12/2010.

¹² *Ibid.*, page 134.

¹³ Damian Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), page 130.

principle upon introduction, its expansion, points of concern and positive effects. The conclusion will subsequently be based on the respective findings.

2. *The Analysis*

2.1 The Conundrum

With European integration gradually gaining more velocity from the time of its onset, one can arguably point out the correlated build-up of criticism fuelled by declining national political power. In 1979 direct elections for the European Parliament were held for the first time, which raised the opinion that national parliaments had hereby surrendered a substantial part of their legislative powers¹⁴, as they were now no longer involved in the adoption of the EEC’s legislative acts they had to implement ‘with a small to inexistent margin of discretion’.¹⁵ This in the long run inevitably contributed to feelings (especially by the national parliaments of Britain, Denmark and the German *Länder*¹⁶) that the EU is too far displaced from its citizens and consequentially lacks democratic legitimacy.

What has moreover escalated the issue and kept it relevant is that Article 10 (1) TEU formally claims that ‘[t]he functioning of the Union shall be founded on representative democracy’, at which it arguably (in the words of Damian Chalmers) ‘appears to fail miserably’¹⁷. To understand this viewpoint better one should study Article 10 (2) TEU, which provides:

“Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

National Governments and the European Parliament are arguably not (adequate) representative institutions. According to Chalmers ‘the history of representative democracy is a history of the development of institutions to curb and hold accountable the growth of executives’ (i.e. national governments). The European Parliament (despite being directly elected) is confronted with a low level of public interest and involvement and citizens are not represented equally in it. Additionally, EU legislation is predominantly seen to be made by ‘administrators’ (i.e. for instance proposed by the Commission, negotiated in COREPER and then adopted by the Council of Ministers), leaving representative democracy out of the picture.¹⁸

2.2 The Principle of Subsidiarity

¹⁴ Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge University Press, 2010), page 122, 123.

¹⁵ European Constitutional Law Network, http://www.ecln.net/documents/sofia_2008/buch/ecln_2008_louis.pdf, page 137. Visited on 01/12/2010.

¹⁶ Susan Senior Nello, *The European Union: Economics, Policies and History*, (McGraw-Hill Education, 2005), page 6.

¹⁷ Damian Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), page 126.

¹⁸ Ibid.

To curtail this challenge, the principle of subsidiarity (currently found in Article 5 (3) TEU) was introduced by the Maastricht Treaty (Article 3b), stipulating:

“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.

The underlying concept thus ensured that whenever relevant, legislation would be proposed by Member States (i.e. national parliaments) instead of the EU. Said otherwise, it enforced the thought of ‘taking decisions as closely as possible to the citizens’ (current Article 10 (3) TEU).¹⁹

2.3 The Expansion of the Subsidiarity Principle

Although the principle of subsidiarity under the Maastricht Treaty referred to acting ‘within the limits of powers’, it was only with the entering into force of the Lisbon Treaty (December 1st, 2009) that for the first time the EU’s and its Member States’ legislative competences were clearly delineated (Articles 2 – 6 TFEU), into either ‘exclusive’; ‘shared’; ‘supporting, coordinating and supplementing action’. This is currently engraved in Article 5 (2) TEU and is called the principle of conferral, impeding upon the EU’s ‘competence creep’.²⁰ Perhaps needless to say, Member States play no legislative role concerning the EU’s exclusive legislative competence, self-evidently meaning that the principle of subsidiarity is not applicable to this category whereas it is to the latter two.

Besides essentially re-stipulating Article 3b of the Maastricht Treaty under current Article 5 (3) TEU, the entering into force of the Lisbon Treaty has resulted in the consolidated version of the Treaty on European Union (TEU) formally expanding national parliaments’ competencies (including the principle of subsidiarity), found under a new provision, namely Article 12 TEU, which reads:

“National Parliaments contribute actively to the good functioning of the Union: ... (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality.”

¹⁹ Susan Senior Nello, *The European Union: Economics, Policies and History*, (McGraw-Hill Education, 2005), page 6.

²⁰ Damian Chalmers, Adam Tomkins, *European Union Public Law*, (Cambridge University Press, 2007), page 59, 60, 64.

The Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality in turn provides for national parliaments to scrutinize the EU’s legislative proposals in accordance with the subsidiarity principle under Article 6:

“Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act...send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.”

In more detail, the protocol then goes on to set out two procedures on how this is to be done. These are so to speak the ‘yellow card’ and the ‘orange card’. The former is found under Article 7 (2):

“Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.”

The second subparagraph of Article 7 (1) mentions that each national parliament obtains two votes (which in case of a bicameral parliament are split). A total of 27 Member States thus equals 54 votes overall, meaning that either 18 votes (one third) or 14 votes (a quarter) are required in order for a draft legislative act to be reviewed by the corresponding EU institution. The Netherlands raised concerns that this was however insufficient and therefore negotiated for a supposedly more constructive procedure, (as its name might suggest) namely the ‘orange card’.²¹ This is found under Article 7 (3):

“Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This

²¹ Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge University Press, 2010), page 129.

reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.”

A simple majority constitutes 28 votes (out of the overall 54 votes) cast by national parliaments in opposition to a draft legislative act.

2.4. Points of concern

The time national parliaments have to scrutinise and send reasoned opinions to the respective EU institutions (when finding EU draft legislative acts not to be in accordance with the principle of subsidiarity) has been prolonged from 6 weeks to 8 weeks with the entering into force of the Lisbon Treaty, under Article 6 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. There is however enduring criticism with regards to this as it has been argued that in order for national parliaments to effectively defend their standpoint in such cases, they ‘will have to organise concentration between them...which is obviously time-consuming.’²² Chalmers elaborates on this, highlighting that national parliamentarians are usually not that well connected with the relevant ministers (due to a minimal amount of supporting staff).²³

More worrying is that, although the Court of Justice of the European Union has the judicial authority to judge whether EU legislative acts are in accordance with the subsidiarity principle (Article 8 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality) it has so far never ruled in favour of a breach of this principle,²⁴ making it doubtful as to whether it is an effective guardian. This is seen as a political dilemma as it has been argued that for the Court to do so, it would hereby be contradicting the three EU institutions (Commission, Council, European Parliament) adopting such measures.²⁵ Furthermore, Mr. Cash (a member of the UK’s House of Commons European Scrutiny Committee) commented during the Committee’s hearing of Professor Dashwood (University of Cambridge) regarding the subsidiarity principle, that ‘the Court would be reluctant to use it [i.e. subsidiarity] if it appeared to impinge on the political process, and we know they want more integration, so it is not very likely.’²⁶ Professor Dashwood confirmed ‘that annulment of a measure on the

²² Ibid., page 127, 128.

²³ Damian Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), page 128.

²⁴ Ibid., page 364.

²⁵ Ibid.

²⁶ House of Commons European Scrutiny Committee. *Subsidiarity, National Parliaments and the Lisbon Treaty*., page 3 of Professor Alan Dashwood’s evidence, question 10.

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf> Visited on 02/12/2010.

ground that it offends against subsidiarity is likely to occur only in extreme circumstances.’²⁷

Professor Hix (London School of Economics and Political Science), who also gave evidence in front of the UK’s House of Commons European Scrutiny Committee, made known that he was sceptical about the high thresholds officially needed to invoke either the yellow or orange card.²⁸ In accordance, the Committee believed that the high threshold under the orange card procedure added “‘very little by way of democratic control over the Commission and the EU institutions...[and that] the required thresholds for preventing further consideration of a proposal must be much lower if the procedure is to have any real utility.’”²⁹

2.5. Positive Effects of the Subsidiarity Principle

Entrusting national parliaments with the right to scrutinize whether EU draft legislative acts are in accordance with the principle of subsidiarity undoubtedly also has positive effects. As mentioned, the UK’s House of Commons European Scrutiny Committee conducted research on the effects of subsidiarity (on national parliaments in light of the Lisbon Treaty). According to Professor Hix, when questioned about the effectiveness of the 8 weeks national parliaments have to send reasoned opinions to the respective EU institutions, he responded by saying that the time needed for national parliaments to scrutinise EU draft legislative acts was a matter of ‘your own rules and procedure and your own timetable than it is on the feasibility of eight weeks’, hence encouraging national parliamentarians to prioritise their work.³⁰ According to Professor Dashwood:

*“the judgment as to whether the subsidiarity principle has been complied with...[has been firmly put] into the hands of those who have an interest in ensuring its application; in other words the national Parliaments. They are the ones losing power to the institutions of the Union and I think they are best placed to make a political judgment to apply this principle.”*³¹

Professor Dashwood believed the yellow and orange card procedures to make ‘a real impact on the political dynamic within the Community’, bound to affect the prospect of measures being adopted.³² Questioned about the necessity of a ‘red card’ (allowing national parliaments to directly halt an EU legislative act instead of it being simply reviewed by the respective EU institution as under the yellow and orange card), Professor Dashwood responded by saying:

“it seems to me that if the Commission [or for that matter from whichever EU institution the draft legislative act originated] persists with a proposal without amending it- to

²⁷ Damian Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), page 367.

²⁸ House of Commons European Scrutiny Committee. *Subsidiarity, National Parliaments and the Lisbon Treaty*., page 3 of Professor Simon Hix’s evidence, answer to question 52.

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf> Visited on 02/12/2010.

²⁹ Ibid., page 10.

³⁰ Ibid., page 15 of Professor Simon Hix’s evidence, answer to question 59.

³¹ Ibid., page 4 of Professor Alan Dashwood’s evidence, answer to question 15.

³² Ibid., page 7.

*which at least one-third of the national parliaments had raised objections- it is going to be quite difficult to assemble a qualified majority within the Council because the ministers from the Member States whose parliaments had raised objections would run a political risk by voting in favour of the measure...”*³³

Stated differently it is Professor Dashwood's viewpoint that a 'red card' is obsolete and the yellow and orange cards are thus sufficient (in scrutinising whether EU draft legislative acts are in accordance with the subsidiarity principle). This is since national parliaments under the current system in essence get their way as it seems politically impossible not to take their arguments into account.³⁴ According to Professor Hix:

*“the Council operates on a culture of consensus, so it really is only going to take one, two, or three parliaments to essentially block anything because it is the Council ultimately which has to make a decision on a piece of legislation and those governments are going to vote “No” in the Council. That will be enough in the Council essentially. It is very rare that legislation gets passed with more than three Member States opposed. The Council operates under a culture of consensus...because the governments all know they have to implement the laws which get passed.”*³⁵

In response to the argument that the thresholds (for the yellow and orange card to be invoked) are too high, Professor Hix has indicated that this is only a minimal concern since the Council tends to take into consideration a national parliament's objections even when the threshold has not been met.

Studying the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality itself, Article 4 thereof provides for:

- national parliaments to receive the Commission's draft legislative acts and its amended drafts at the same time as the Union legislator does (i.e. European Parliament and the Council of Ministers).
- national parliaments to receive the European Parliament's draft legislative acts and its amended drafts.
- national parliaments to receive draft legislative acts and amended drafts from the Council of Ministers, originating from Member States, the Court of Justice, the European Central Bank or the European investment Bank.
- national parliaments to receive the adopted legislative resolutions of the European Parliament and the position of the Council of Ministers thereon.

What this has in common is that national parliaments are informed by the respective EU institutions, avoiding the consultation of the national governments first (i.e. executives) who then hand over the information to their national parliaments, hereby efficiently speeding up the process.

³³ Ibid., page 7 of Professor Alan Dashwood's evidence, answer to question 30.

³⁴ Damian Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), page 130.

³⁵ House of Commons European Scrutiny Committee. *Subsidiarity, National Parliaments and the Lisbon Treaty*, page 13, 14 of Professor Simon Hix's evidence, answer to question 52.

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf> Visited on 02/12/2010.

Article 8 of the respective protocol mentions that:

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.”

Although dependent on a Member State’s ‘legal order’, which seems to give it some discretion on how to provide its national parliament with the corresponding right, this provision could at least theoretically be interpreted as a direct right for national parliaments to bring a case in front of the Court of Justice.³⁶ Due to the recentness of the Lisbon Treaty, it is still a matter of time to see if the enhanced legislation delegated to national parliaments will be used effectively. With national parliaments having lost significant legal authority (on the EU level) with the subsequent increase in European integration (as discussed earlier on), they will arguably be more stringent with invoking a breach of the subsidiarity principle (i.e. Article 8) than their governments (i.e. executives). In the political arena, this could ensure that EU draft legislative acts will to a greater extent adhere to the principle of subsidiarity, now that EU institutions are aware that national parliaments directly hold such a potentially substantial remedy.

It should be noted that concerns about the ECJ’s unwillingness to rule in favour of a breach of subsidiarity will perhaps be (partially) alleviated by the yellow and orange card procedures. Professor Dashwood argued that, when invoked, these should guarantee sufficient ‘reasoned opinions’ from national parliaments (regarding why an EU draft legislative act is thought to breach the subsidiarity principle) providing the Court political leeway in the face of the respective EU institutions.³⁷

3. Conclusion

From the preceding text it can be deduced that a ‘red card system’ would largely be obsolete, since the yellow and orange card procedure arguably provide national parliaments with sufficient scrutiny of whether the EU’s draft legislative acts adhere to the subsidiarity principle.

Concerns regarding the relatively short time period awarded to national parliaments to send reasoned reports (to the respective EU institutions about a draft legislative act’s compliance with subsidiarity) should indeed be taken into account, but depending on its still-to-see achievability at least currently be perceived as being substantially not too fundamental. Of greater calibre is whether the Court of Justice of the European Union is from a judicial standing an effective guardian of the subsidiarity principle. Although significant, even that concern is potentially downplayed by the leeway the Court will have in judging a case, in the face of it contradicting the EU

³⁶ Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge University Press, 2010), page 130.

³⁷ House of Commons European Scrutiny Committee. *Subsidiarity, National Parliaments and the Lisbon Treaty*. page 6 of Professor Alan Dashwood’s evidence, answer to question 27.

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf> Visited on 02/12/2010.

institutions adopting the draft legislative acts as these are in turn scrutinised by national parliaments. The criticism of there being a too high threshold especially for the orange card system, already indicates in this sense that a red card would be obsolete because this would (its effect being greater) necessitate an even higher (most likely not obtainable) threshold.

Despite persistent scepticism, it seems that regarding the subsidiarity principle the Lisbon Treaty has endowed national parliaments with effective scrutiny. In general terms this is the case since Professor Dashwood and Professor Hix have made it evident that the viewpoints of the national parliaments are in reality taken into account by the Council (through which the draft legislative acts pass) even when the official thresholds to invoke either the yellow or orange card have not been obtained. It would be politically unfeasible for it not to do so. It would be appropriate to officially lower the bar as not doing so has as a consequence that the Council's current contradictory behaviour leads to a grey area wherein this institution is merely deceiving itself.

From the perspective of the competences (concerning the subsidiarity principle) bequeathed by the EU institutions upon national parliaments, it can be concluded that the EU's democratic legitimacy should in this respect consequently improve.

DOES THE SUBSIDIARITY PRINCIPLE FULFILL ITS PURPOSE? – AN ANALYSIS OF THE AIM AND THE ACTUAL APPLICATION OF THE SUBSIDIARITY PRINCIPLE POST LISBON TREATY

Sophie Mansson

Abstract: With the incorporation of the principle of subsidiarity into the Treaty of Maastricht, the need to balance the competencies of the Member States and Union was still not settled. With the expansionist nature of the Union, the limits to centralisation are ever more put into question. As a mechanism to ensure that each level acts in accordance with the powers conferred upon them, the subsidiarity principle has not been particularly successful. Despite being the second most mentioned principle after the introduction into the Treaty of Maastricht¹, it has been described as an empty legal shell since after almost 20 years of existence the European Court has failed to find a conflicting legal act. The issue can be pinned down to the absence of a neutral legal structure, both in the context provided for in the Treaty and in application by the Court. The need for a more federally proportionate measure to ensure an appropriate division of competence is paramount.

1. Introduction

With the entry into force of the Treaty of Lisbon on the 1 December 2009, the European Union has not only been awarded a legal personality but also an increase in its competence. This even goes as far as establishing a coherent system of external EU policies². With the powers of the Union being further enhanced and the scope for action being further increased, the practical need for a clear division of powers between Member States and the Union becomes more pressing. Of course such a system is already in place in the form of the European Court of Justice with its power of judicial review and the principles laid down in the TEU governing the relationship between the European Union and Member States as regards law making. Article 5 of the Treaty on the European Union comprises the principles of conferral, subsidiarity and proportionality. The principle of subsidiarity is seen as especially important in delimiting areas in which the Union or Member State level has competence for taking legal action. Article 5(3) TEU more specifically stipulates that:

¹ Schilling, Theodor, "Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously", Jean Monnet Working Paper, 10/95 (1995).

² Elsuwege, Peter Van, "EU External Action after the Collapse of the Pillar Structure: In search of a New Balance between Delimitation and Consistency", Common Market Law Review 47: 987-1019.

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

In the past this principle has been described as a “double-edged sword”, preventing both the higher and lower level “from taking action in areas properly falling within each other’s respective fields of action.”³ This need for a clear separation of competencies was significant factor in its implementation as a constitutional principle into the Treaty of Maastricht in 1992. Academics went as far as saying that subsidiarity was the “word that saved Maastricht”⁴, which demonstrated the pressing need for a buffer against the forceful expansionism of the Union. However, the Treaty on the European Union did not settle the principle and remained without clear conceptual contours⁵. In the preparatory work for the Constitution, the working group on subsidiarity felt that the principle needed to function as “ballast” between Union and national interests⁶. The need for a substantive change was reinforced by the fact that the Court of Justice had after almost 20 years of existence failed to strike down a legislative act under Article 263 TFEU for conflicting with the principle. Due to hands-off approach of the court the contours of the principle were not developed. The Treaty of Lisbon strengthened the subsidiarity principle by increasing the involvement of national parliaments in this respect.

In order to understand the subsidiarity principle in its current form a number of aspects have to be taken into account. Firstly the principle of subsidiarity *sensu stricto* will be examined. This includes its historical development from the Canon law to the Treaty of Lisbon. Secondly the legislative context in which subsidiarity functions will be taken into account. This encompasses a systematic analysis of the subsidiarity functions, focusing on its application based on the Treaty provision. Particular regard will be paid to different critiques expressed by various academics and a brief analysis will be made as to whether or not the changes made in Lisbon, comply with the aim subsidiarity purports to achieve. Thirdly the practical application of subsidiarity by the Court will be examined. Thereafter a number of easily reconcilable solutions will be suggested before drawing a conclusion.

³ Toth, A.G. ‘Is Subsidiarity Justiciable?’, 19 *ELRev* 268 (1994) 278, in relation to Art 3 b (2) ECT.

⁴ Cass, D.Z., “The Word That Saved Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community”, 29 *CML Rev* 1107 (1992).

⁵ Robert Schütze (2009). *SUBSIDIARITY AFTER LISBON: REINFORCING THE SAFEGUARDS OF FEDERALISM?*. The Cambridge Law Journal, 68, pp 526.

⁶ In the preparation for the Constitutional Treaty a working group was established to consider the need for change with regards to the subsidiarity principle. Despite the fact that the Constitution did not come into force, the discussions are representative for the Member States perception of that Community legislation was too intrusive. The European Convention, “Working Group 1: Subsidiarity” http://european-convention.eu.int/doc_register.asp?MAX=11&LANG=EN&Content=WGI (access on 8 December 2010)

2. *From Canon Law to Lisbon*

The principle of subsidiarity has its origin in the canon law as laid down by Pope Pius XI⁷. The constitutional principle's formal introduction⁸ into the law of the European Union came with the Treaty of Maastricht in 1992, symbolising a change in the political and legal culture of the Community. But we must ask the question; what exactly provoked this change? Historically Member States possessed a veto right in respect of legal decisions made at Union level which allowed them a greater influence in decision making procedure. The introduction of the Single European Act in 1986 replaced this procedure with qualified majority voting. Further to this development the Maastricht Treaty saw an increase in powers awarded to the Community and, consequently, the Member States 'Voice'⁹ shrank. This was enhanced by the participation of the European Parliament in the decision making process¹⁰ and the growth of the European Community in size. Behind the scenes the strategy of non-compliance was made more difficult by judicial activism as in the case of *Francovich*¹¹ through the court introduced state liability. The strong desire for a mechanism to protect the Member States from overly centralised and an over-extension of legislative competence was felt as the Community seemed to take on a life of its own.

At first the effect of the subsidiarity principle was unclear; would it be a political maxim or legally enforceable rule?¹² With the Protocol on the Application of the principles of Subsidiarity and Proportionality in 1997¹³ supplementing Article 5(2) EC, the intention of the legislator was further clarified. This laid down guidelines as to how the principle should be applied, the most important of which was the move away from an overly detailed harmonisation and practice of restricted delegation, which was problematic at the time¹⁴. However the woolly nature of subsidiarity prevailed; De Burca described it as a "cloudy and ambiguous concept which is readily open to instrumental use. The principle is politically complex and legally uncertain"¹⁵

With the Treaty of Lisbon some aspects of the subsidiarity principle were changed. Firstly the Amsterdam Protocol was replaced. This abolished some of the

⁷ This was laid down in the Encyclical *Quadragesimo Anno* in 1891 which reconstructed a principle that had established 40 years earlier. Robert Schütze (2009). *SUBSIDIARITY AFTER LISBON: REINFORCING THE SAFEGUARDS OF FEDERALISM?*. The Cambridge Law Journal, 68, pp 526.

⁸ The principle was introduced into the Single European Act but only with regard to environmental legislation: Article 130 r (4) EEC after amendments by the Single European Act.

⁹ Schilling, Theodor, "Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously", Jean Monnet Working Paper, 10/95 (1995).

¹⁰ Article 189b ECt.

¹¹ In addition to sanctions being introduced for non-compliance with judgments by the ECJ (Article 171 ECT). Case C-6/90 and 9/90, *Francovich and Bonifaci* [1991] ECR I-5403, 5414.

¹² Jessica Koch & Matthias Kullas, *Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge?*, Centrum für Europäische Politik (CEP) März 2010.

¹³ Protocol on the application of the principles of subsidiarity and proportionality (Official Journal C 340, 10 November 1997)

¹⁴ Davies, Gareth, "Subsidiarity: The wrong idea, in the wrong place, at the wrong time", *Common Market Law Review* 43: 63-84, 2006.

¹⁵ De Burca, Grainne, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor", *Journal of Common Market Studies*, Vol. 36, No. 2 (June 1998).

guidelines in the application of subsidiarity; for example the requirement to give preference to Directives rather than Regulations¹⁶.

The most important mechanism introduced is the requirement that national parliaments have a voice in decision making. New Article 5(3) and 12(b) TEU in conjunction with the new Protocol¹⁷ provide the national parliaments with the power of compliance control by use of a 'yellow'¹⁸ and 'orange card'¹⁹ procedure. Article 8 of the Protocol further provides that national parliaments have the option of applying for an annulment procedure, in accordance with Article 263 TFEU, if the statement of subsidiarity is not taken into account by the Commission.

One might ask oneself what exactly the purpose of the principle of subsidiarity is. The aim ascribed by the Member States was to minimise the legislation produced by the Union where there is a shared competence and to guide the choice of legislation at Member State level. This is reaffirmed by the Preamble to the Lisbon treaty which states that Member States are resolved "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". To conclude, the predominant aim of the subsidiarity principle is to ensure that the Union does not intrude too much on national, regional, local and cultural identities of the nation states within.

In the preparation for the European Constitution a working Group was set up to discuss the reform of the subsidiarity principle²⁰. Therein it was set out that a primary aim of the reform was to provide for a better distribution of competence. But to what end was the reform needed and how is that met by the changes made in Lisbon?

The political relevance of the subsidiarity principle is elucidated by the fact that it was the second most mentioned principle in the European Treaties after the Maastricht Treaty²¹. Article 5(3) TEU now lays down a threefold test in the application of subsidiarity.²² Firstly the competence criteria provides that in matters that do not fall under the exclusive competence of the Union²³ this principle should in practice apply. Secondly a necessity test requires consideration to be paid to whether the objectives attained in the measure could be achieved adequately on a national level. Thirdly, as clarified by the Treaty of Lisbon, with regard to scale and effect, the measure attained can be better achieved at Union level, i.e. constituting a comparative efficiency test. This can be described as the test of a bipolar constitutional logic as the second criteria is an expression of cultural identity and the third concerns the minimizing disruptions that a legislative measure could cause²⁴. Here the Court is under an obligation to strike a

¹⁶ As prescribed in subsection 6: "Other things being equal, directives should be preferred to regulations and framework directives to detailed measures."

¹⁷ Protocol (2) on the Application of the Principles of Subsidiarity and Proportionality (Official Journal 17.12.2007)

¹⁸ Article 3, 6 and 7(2) in Protocol (1) on the role of national Parliaments in the European Union (Official journal 2007, C-306)

¹⁹ Article 3 and 7(3) in Protocol (1) on the role of national Parliaments in the European Union (Official journal 2007, C-306)

²⁰ Although the Constitutional Treaty did not come into force the points made in the Working Group reflect the aim of what Member States wanted to achieve in reforming the principle of subsidiarity.

²¹ Schilling, Theodor, "Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously", Jean Monnet Working Paper, 10/95 (1995).

²² Jessica Koch & Matthias Kullas, Subsidiarität nach Lissabon –Scharfes Schwert oder stumpfe Klinge?, Centrum für Europäische Politik (CEP) März 2010.

²³ as listed in Article 3 TFEU.

²⁴ Chalmers, Damian. *European Union Public Law*. Cambridge: Cambridge UP, 2010, page 363.

balance between interests of the Union and the Member States. It could be argued at this point however, that the latter test of comparative efficiency is centralising in its nature, as it is arguable that distributions are caused by diverging laws in the field. Furthermore this is a difficult task for the Court in applying the test, as the legislation set is normative and vague terms such as ‘sufficiently’ and ‘better achieved objectives’ are used. In the following Sections the actual application of the principle of subsidiarity as amended by the Treaty of Lisbon will be discussed in terms of the Treaty context and the material application by the Court of Justice. This will be viewed in terms of the criticisms voiced before the Treaty came into force to determine if the amended principle has realised the deficit.

3. *The Legislative Context of Subsidiarity - Improvement by the Lisbon Treaty?*

Already having seen the intentions of the legislators with regard to the effect of subsidiarity, now the actual legal context in which subsidiarity functions will be observed. Here criticisms made by academics will be presented to see if the Lisbon subsidiarity meets the stands the test of the time.

First of all the principle of subsidiarity has been criticised for being misunderstood and wrongly applied. Schütze makes the point that the distinction is often made between whether the Union should exercise its competence (subsidiarity principle) and, in such a case that it should, how this should be done (principle of proportionality). Instead subsidiarity should be perceived as “federal proportionality”²⁵. Questioning ‘whether’ the Union should act is a matter for the field of dual-federalism and implies either-or logic. However when looking at the scope of Article 5(3) the Court is restricted to purely an examination of the Union aim for the measure. Furthermore the two principles are tied together and in determining the competence the legislator should look at “whether the European legislator has unnecessarily restricted national autonomy”²⁶. This would give regard to whether the legislator should act depending on the ramifications of the specific action on the Member States prerogative.

With the Treaty of Lisbon, and particularly by the supplementary Protocol, the application of subsidiarity is clarified. The test laid down in Article 5(3) TEU verifies if the objectives can be sufficiently achieved by Member States and the comparative efficiency requirement is met. Here then due consideration is given to ‘federal proportionality’. Although it could be argued that the prior condition makes an attempt to respect national cultural identity²⁷ it again only focuses on the question of ‘whether’ and not ‘how’ this would be impinged on. In Article 5 of the Protocol proposals made shall be justified on grounds of the principles of subsidiarity and proportionality by providing qualitative and, if possible, quantitative indicators for why it would be better achieved by the Union legislator. However this can definitely be said not to include an actual analysis as to the proportional federal impact this would have on a Member State. There seems

²⁵ Robert Schütze (2009). SUBSIDIARITY AFTER LISBON: REINFORCING THE SAFEGUARDS OF FEDERALISM?. *The Cambridge Law Journal*, 68, pp 526.

²⁶ *Ibid*, page 533.

²⁷ Chalmers, Damian. *European Union Public Law*. Cambridge: Cambridge UP, 2010, page 363.

then to be an imbalance created by the strict separation of the two principles, restricting the requirement to take into account the other side of the coin.

Gareth Davies remarks that one of the central flaws of the subsidiarity principle is its lack of a neutral structure which in normal federalism is protected by a Constitution and the Court.²⁸ Within this a clear delimitation of powers is needed in the form of substantive law based legitimacy. A neutral structure would be legislatively provided for then if the tasks are clearly assigned to each level and as a result act within the powers conferred. With the Treaty of Lisbon the inclusive nature of the competencies awarded to the European Union remained unamended. This can be seen by the broad legal base provided for in the internal market clause (Article 114 and 115 TFEU) and also the mop-up clause in Article 352 TFEU provides the union to take action to achieve one of the objectives laid down. Davies mockingly suggests that this could include anything from a single language to a European Contract Code²⁹. In the example of the latter the first test would then be to see if there is a legal basis which could be found in the internal market Articles to remove obstacles to movement or for distortion of competition. Secondly the objectives of the attained measure could not be sufficiently achieved by Member States as they would not have the actual capacity to take such a far reaching measure³⁰. With regard to scale and effect of the measure, mere incompatibility would render it better be achieved on Union level. Here, subsidiarity does not serve as a balance between 'competing policies and interests'³¹.

In such a situation the parliamentary mechanism of ensuring compliance control for subsidiarity could come in handy. If states would feel that such a measure would be too intrusive they would first have the option of playing the 'yellow' or 'orange' card tool depending on the procedure used in the disputed legal proposal. If the Commission would choose to ignore this they would still have the option of bringing an action for annulment under Article 263 TFEU as stipulated in Article 8.

However the lack of the neutrality can also be seen in the biased structure of the Treaty³². In a sense the Union can be seen as having a privileged position in comparison with the member States as the subsidiarity principle does not actually manage to strike a balance between the two structural levels. With the absence of the Treaty in providing for a clear separation of competencies for the two levels of governance, the Union level has an advantage in the sense that actions taken can be justified more easily than annulling such an action for intruding in areas which belong to the national autonomy of member States. This is obviously a constitutional issue which goes beyond the need for a

²⁸ Davies, Gareth, "Subsidiarity: The wrong idea, in the wrong place, at the wrong time", *Common Market Law Review* 43: 63-84, 2006.

²⁹ The concept of a European Contract Code has actually been discussed widely for further information look at: Martijn W. Hesselink, *The Politics of a European Civil Code*, *European Law Journal* 10 (2004), pp. 675-697. Jan M. Smits, "Diversity of Contract Law and the European Internal Market" *The Need for a European Contract Law: Empirical and Legal Perspectives*. Ed. Jan Smits. Groningen: Europa Law Publishing, 2005. 153-186. Brunsden, Jim. "Call for Single Contract Law System | Policies | Health & Society | Society & Culture | European Voice." *European Voice / An Independent Voice on EU News and Affairs*. 17 June 2010. Web. 01 July 2010. <<http://www.europeanvoice.com/article/imported/call-for-single-contract-law-system/68278.aspx>>.

³⁰ For clarification on the use of the conditions: Jessica Koch & Matthias Kullas, *Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge?*, *Centrum für Europäische Politik (CEP)* März 2010.

³¹ Davies, Gareth, "Subsidiarity: The wrong idea, in the wrong place, at the wrong time", *Common Market Law Review* 43: 63-84, 2006.

³² Davies, Gareth, "Subsidiarity: The wrong idea, in the wrong place, at the wrong time", *Common Market Law Review* 43: 63-84, 2006.

subsidiarity mechanism but as far as this principle is concerned it could be argued that some improvement has been made through the parliamentary involvement. Although it might not be a strong tool in itself it could help the Court politically in striking down a balance between union and Member State interests.

4. *The Court of Justice and the Application of the Subsidiarity Principle*

In determining the application of the principle of subsidiarity, the European Court of Justice is the ultimate interpretive authority³³. The unwillingness of the Court to rule on this principle can be seen through the fact that it yet has to strike down a legal act for being contrary to this principle and this after almost 20 years of being in force. That it is litigable was first place was expressed in the *British American Tobacco* case³⁴ but with the introduction of the Treaty of Lisbon this is specifically laid down in Article 8. This provides that the Court in accordance with the annulment procedure in Article 263 TFEU has jurisdiction to rule that a legislative act was contrary to the principle of subsidiarity. The application for such an annulment procedure can however only be brought by Member states or on behalf of their national Parliament or a chamber thereof. This judicial review of acts of the legislator functions as a counter-majoritarian mechanism³⁵ making the Court the only Institution which can uplift the legality of an act. As the Treaty of Lisbon does not change the role of the Court on the application of the subsidiarity principle ex post the general issues of application of the subsidiarity principle will be looked at to determine if there is need for change.

The first issue in this regard can be characterized by the absence of clear conceptual contours that the Treaty sets out for the principle of subsidiarity. In the definition of subsidiarity itself it sets a normative and vague³⁶ standard which the Court is expected to review. In Article 5(3) TEU the test on subsidiarity is threefold; the competence, whether or not the aim of the objective can be sufficiently achieved by Member States and if by reason of scale an effect the measure can better be achieved on Union level. Here the Court is under an obligation to define what 'sufficient' and 'better' achieved would mean in each separate circumstance. With this regard the Court has adapted very light test as can be seen in the *Biotechnology Directive* case³⁷. In this case the Dutch government challenged the Directive on the ground that it gave few reasons for why this could be better achieved on Community level and that it prejudiced national rules on property ownership as prohibited by the Treaty. In ruling the Court applied the test in a very superficial manner. By summing up what the criteria for application it stated that the objective perused by the Directive could not have been achieved by member States alone and that by reason of scale and effect it could be better achieved by the

³³ De Burca, Grainne, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor", *Journal of Common Market Studies*, Vol. 36, No. 2 (June 1998).

³⁴ Jessica Koch & Matthias Kullas, *Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge?*, *Centrum für Europäische Politik (CEP)* März 2010.

³⁵ Estella, De Noriega, Antonio. *The EU Principle of Subsidiarity and Its Critique*. Great Clarendon, Oxford: Oxford UP, 2002.

³⁶ Van Kersebergen, Kees and Verbeek, Bertjan, "The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union", *European journal of international Relations*, Vol.13(2):217-238.

³⁷ Case- C-377/98 *Netherlands v European parliament and Council (Biotechnology Directive)* [2001] ECR I-7079.

Community. Furthermore it stated that the Directive gave sufficient reason for taking action in first place.

The Courts doctrine on subsidiarity has been described as prudent³⁸ but it could also be described as very basic. As mentioned in Section I the aim in the minds of the legislators in establishing the principle of subsidiarity was to have a clear division of powers, where member States would have a mechanism to protect themselves against too expansive or intrusive Union competencies. This would mean that in cases described above the Member state would have a chance to have a say in matters feel going beyond the powers of the Union. By the Court only procedurally looking at what is required by the principle of subsidiarity, this implies that the Union is in a favourable position in that the Court looks at the aims the measure purports to achieve. As was displayed the aims of the Union are sometimes laid down in such broad ways (as best seen by the mop-up clause), that the room given for leeway seems endless. This is only increased by the biased structure as described above where the Court, in itself given existence and jurisdiction by that law, is asked to balance interests.

In the ruling of the *Biotechnology Directive* case the Court states that sufficient reason was given for why the objective could be better achieved on Community dimension. This reaffirmed the belief that the Court mainly follows a procedural examination in observance with the subsidiarity principle. Genially the duty to give reason as provided for in Article 296(2) is nor generally not a strong obligation in the Union legal order³⁹.

This naturally leads to the question as to why the Court has adopted such a hand-off approach to ruling on the principle of subsidiarity. Critical tongues would even go as far as stating that the principle is a empty legal shell due to it never haven been struck down. Part of this can be understood by the explanation given by meeting Group on the European Convention which described the principle being essentially political in nature, implying the need for a considerable margin of discretion on the part of the legislator. In this sense the question of the Court striking down a legal act for being contrary to the principle of subsidiarity must be understood in context with the separation of powers.⁴⁰ Judicial review of this nature should then only be allowed in circumstances as stated in Article 263(2) TFEU on grounds of lack of competence, infringement of an essential procedural requirement, by nature of infringement of the Treaties or misuse of powers. Referring back to the need for the subsidiarity mechanism establishing a balance between the Union and Member State competence to act would then again be better protected by means of “federal proportionality” as described above. To conclude it seems that only in extreme circumstances the Court will apply in a “robust way a principle which is so heavily political.”⁴¹

³⁸ Estella, De Noriega, Antonio. *The EU Principle of Subsidiarity and Its Critique*. Great Clarendon, Oxford: Oxford UP, 2002.

³⁹ One example can be provided by in the following cases: Joined Cases C-346/03 and C-529/03 *Atzeni and Others v Regione autonoma della Sardegna* [2002] ECR I-1875.

⁴⁰ In the Trias Politica Model as introduced by Montesquieu.

⁴¹ Dashwood, A. “The Relationship between the Member states and the European Union/Community” (2004) 41 *Common Market Law Review* 367.

5. *The Way Forward - Suggestions for Improvement*

In light of the observations made the aim of subsidiarity establishing a balance in areas where Member States and the Union have competing policies and interests⁴², is not adequately met by legislation and Court application in the matter. In finding a solution various suggestions by authors have been made including establishing a European Senate, ex ante judicial application of the principle of subsidiarity or just taking an example in the American Supreme Court by way of the clear statement rule and the rule on presumption against pre-emption⁴³. With the introduction of the Lisbon Treaty the mechanism of parliamentary involvement can already be seen as a way forward in national involvement but also as a mechanism for the Court to have the objectives Member States clearly spelled out making allowing such a politically sensitive topic to be defended by both parties. However this would only be the case if the Court would have the option of looking at the other side of the coin, which subsidiarity in a strict sense (and the way it is applied by the Court) it does not give it the option to do. The following suggestions therefore look at means which could be employed by mere fact of judicial activism to strengthen the need for balance.

As has been suggested above one mechanism which could serve this interest is in the form federal proportionality. As discussed by Davies in subsidiarity cases before the Court⁴⁴ a proper assessment of proportionality was not made. This was due to its difficult political character but also because they were not addressed by the parties. In this sense the Court did not engage in assessment of what he calls 'true proportionality' and Member states focused their arguments on subsidiarity. Of course such a discussion would inevitably lead to new forms of concerns of a political nature as it would be hard for the Court to analyze arguments of cultural significance in balancing Union and national interests against each other. Such questions as Davies points out ultimately question the competence of the Court to balance such interests. This leads us back to the original argument on how division of competencies in a federal structure should be safeguarded by the Court. In my view, the Court should, unless it wants to be seen as Union biased, consider itself competent to strike a balance between interests on both levels.

Another reconcilable suggestion, put forward by De Burca, would be to put the Court itself under an obligation to follow the principle of subsidiarity. In this sense she does not question the Court as the ultimate interpreter of the principle of subsidiarity but questions whether specific limits could be required by the Court to this regard. Specific requirements would then include extensive consultation, annual reporting and justification for compliance⁴⁵. Particularly the last condition would fall under the duty to give reason as protected under Article 296(2) would be interesting in the application of the principle of subsidiarity (or federal proportionality as discussed above) as the Court

⁴² Davies, Gareth, "Subsidiarity: The wrong idea, in the wrong place, at the wrong time", *Common Market Law Review* 43: 63-84, 2006.

⁴³ Schütze, Robert (2009). *SUBSIDIARITY AFTER LISBON: REINFORCING THE SAFEGUARDS OF FEDERALISM?*. The Cambridge Law Journal, 68, pp 526.

⁴⁴ Examples there of are: C-84/95, *UK v Council (Working time Directive)*, [1996] ECR I-5755. Case C-491/01, *British American Tobacco*, [2002] ECR I-11453. Case C-377/98, *Netherlands v Parliament and Council (Biotechnology Directive)*, [2001] ECR I-7079.

⁴⁵ De Burca, Grainne, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor", *Journal of Common Market Studies*, Vol. 36, No. 2 (June 1998).

would be obliged to balance the interests between Union and Member State and justify a verdict. However in my view this would be an unreasonable burden on the Court in comparison to the impact it would have in improving such a need for balance.

Despite that the replacement of subsidiarity by the principle of federal proportionality in application of the Court, the problems made evident by the principle of subsidiarity are much more deep rooted than can be solved so easily.

6. *Conclusion*

To sum up, it has been seen that the importance of the principle of subsidiarity was first conceived in the Treaty of Maastricht. The Member states felt that, in response to the centralizing nature of the Community, a mechanism had to be introduced to limit the competencies of the Community to situations where this was necessary. With the Lisbon Treaty in force in 2009 however, the power of the Union seems to be bigger than ever and the problem of subsidiarity has not yet been fully solved.

Although the Lisbon Treaty introduces the mechanism for compliance control of national parliaments for legislative proposals, this does not solve the problem that subsidiarity mainly works in favour of the Union dimension. This is due to various factors such as strict division between the principle of proportionality and subsidiarity. If they prior were observed more strictly in terms of subsidiarity, this would mean a test which would make national interest more explicit than it is with the current test. The measure would be observed in terms of its federal proportionality protecting national autonomy from “falling victim to less important [Union] action”⁴⁶ As can be seen the legal context in which the principle of subsidiarity functions does not protect the aim intended.

The application of the principle by the Court is made difficult by the imprecise nature described above. Additionally, striking a balance of interest involves political considerations and instead the Court has chosen to take a prudent approach by not ruling on the matter as a hole.

One way in which the subsidiarity principle could be prevented from turning into an empty legal shell would be by applying the principle of proportionality in conjunction with the principle of subsidiarity. But again, this leads to a more political question. However it should be born in mind that just because the issue is a sensitive one, it does not mean that it does not exist. To conclude the need for a neutral structure is most evidently seen by the subsidiary means in which the principle of subsidiarity has been used in the European Union.

⁴⁶ Davies, Gareth, “Subsidiarity: The wrong idea, in the wrong place, at the wrong time”, *Common Market Law Review* 43: 63-84, 2006.

KOMPETENZ-KOMPETENZ: THE VIEW OF THE POLISH CONSTITUTIONAL COURT ON WHO DECIDES ON THE AUTHORITY OF EU LAW

Camiel G.H. de Wert

Abstract: In this essay I will assess what the view of the Polish Constitutional Tribunal is when it comes to the authority to decide on matters related to competence between MS and the EU. As will be demonstrated, this view is very ambiguous. I will try to demonstrate this, show that despite changes in the Treaties governing the EU this issue is still relevant and subsequently assess what worries constitutional courts so much when it comes to the primacy of EU law.

1. Introduction

A politically interested, Dutch high school student, my attention in the spring of 2005 was very much drawn to the referendum ordered by the Dutch government on a Constitution for Europe. A very prominent place in the debate preceding the final vote was reserved for the Dutch politician Geert Wilders whose main objection was that the European Constitution would place European Union (EU/the Court) law above the national laws of the Members States (MS). A year later however, as a law student in Maastricht the turmoil provoked by the Dutch politician seemed like much ado about nothing to me, for had Wilders' fear not become reality decades before in the case law of the European Court of Justice (ECJ)? Was it not generally accepted that, the EU being a supranational organization, the rules it issued had a position supreme to that of national law?

Closer study of the subject taught me that the debate can not be described in such bold terms, though. Judgments of constitutional courts in several European MS demonstrate that the intense discourse in this field has continued to attract lawyers' and scholars' attention through the years. A very recent example of a national court contributing to the debate has been the judgment of the Polish Constitutional Tribunal (PCT) in *The Accession Treaty* case in 2005.¹

Studying some articles in the preparation for this essay, I considered the content and background of the Polish judgments are very interesting in their own right and found out that the Polish position on the authority of EU law is in fact far from clear. Therefore, I have deliberately chosen to take another approach towards this topic than the one suggested in the brief description provided.

In this paper, which will be presented at the student conference on the foundations of EU law in Maastricht on December 10, 2010, I will first try to establish what that decision of the PCT actually entailed and demonstrate that it is not just the abovementioned case that matters. Subsequently, I will show the case law's practical relevance and elaborate on the (possible) motives behind this kind of contentious jurisprudence in general. Naturally, the essay will be finalized with a conclusion.

¹ PCT May 11th 2005, K 18/04

2. *Setting the Scene*

In order to fully grasp the meaning and results of the Polish judgment, it is important to first establish what the German title of this paper actually means. The issue of *Kompetenz-kompetenz* - roughly put – evolves around the question which court has the ultimate authority to decide on matters related to competence between MS and the EU. Obviously, this question is closely connected to and can not be answered without taking into account the issue of primacy of EU law. In setting the scene for this debate a number of famous ECJ decisions must not be overlooked. Firstly, in *Van Gend & Loos*, the Court stated that with the EC Treaty, the MS had established a ‘new legal order of international law for the benefit of which the state had limited their sovereign rights’.² Not only had the states given up some of their sovereignty, since two years later, in its famous ruling in *Costa v ENEL*,³ the Court concluded from the aforementioned judgment that Community law was superior to national law. From its judgment in the third landmark case that can not be left out here, *Simmenthal*,⁴ it follows that ‘any inconsistent national legislation recognized by national legislatures as having legal effect would, in the Court’s view, deny the effectiveness of the obligations undertaken by the member states,...’ and therefore ‘...are effectively invalid from their adoption.’ By, thus, stating that national law should be set aside in case of conflict with EU law made clear what had appeared to be the case already after *Costa/ENEL*, namely that EU law has a position of primacy with respect to national law.

What may strike the eye in the paragraph above is that, so far, the primacy of EU law has been proclaimed solely in case law of the ECJ. This is especially odd, since one would normally say that this kind of impairment of the legislative sovereignty of the MS would have to be extremely well-founded and legitimated by the effected entities, the MS. The debate and arousal that followed this development in MS’ national politics will be discussed briefly further on in this essay, but in the drafting process of the Treaty establishing a Constitution for Europe (the European Constitution), it was indeed attempted to codify the principles developed in the ECJ’s case law decades before. In Art. I-13 of this European Constitution, it was stipulated that with respect to competences conferred upon the Union by the MS, EU law would have primacy over their national laws.⁵ This very explicit statement of EU sovereignty upset not only politicians like the one mentioned in the introduction to this essay, but was probably seen as too pro-European at any rate, as it was nowhere to be found in the subsequent Lisbon Treaty. However, this agreement had a Declaration attached to it, Art. 17 of which explicitly recalled that not only the Treaties but also other EU laws and the case law of the ECJ have primacy over MS’ laws. Eventually, the audacious case law of the ECJ has thus been written down and ratified.

Taking this into account, it would be rather unimaginable for any national court, either lower or constitutional (or any other kind of court attributed with supervisory

² ECJ 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

³ ECJ 6/64 *Flaminio Costa v ENEL* [1964] ECR 585

⁴ ECJ 106/77 *Simmenthal* [1978] ECR 629

⁵ Treaty establishing a Constitution for Europe, Art. I-13

tasks), to just give priority to national legislation. This firm establishment of primacy does not mean that the principle is no longer open to debate, though. The Treaty has not changed the position of national constitutional or senior courts as regards their ability to give binding opinions on who has binding legal authority and to what extent in their particular jurisdiction;⁶ as can be told from the Polish judgments to be discussed here, a few important difficulties are still to be resolved.

3. *The Decisions by the PCT*

It is against the background described above that the PCT gave its much-debated opinion on EU law authority. It did so, however, not in one but in two separate judgments which were delivered within two weeks time. First came its judgment in the case *European Arrest Warrant*⁷ of April 27th 2005, on May 11th 2005, it passed judgment in the *Accession Treaty* case. Considering the fact that a mere two weeks elapsed between these judgments, one would say that the second would provide a confirmation of what has been stated in the first. As will be made clear in the following, this is not necessarily the case in the matter at hand, or is it eventually...?

Preceding their accession to the EU in 2004, when the Polish were in the process of transposing the Framework Decision on the European Arrest Warrant⁸ into their national laws, an intense debate arose as to whether the necessary amendments to the Polish Criminal Procedure Code (CPC) were compatible with the Constitution. The discussion focused on the compatibility of Art. 55 of the Constitution, which entailed a general prohibition on extradition of Polish citizens, with the proposed Chapters 65 a and b of the CPC. In particular, provision 607 t - an article containing a restriction on the surrender of Polish citizens to other MS trying to persecute them - of the amended CPC was said to violate the Constitutional prohibition as it left the possibility open that citizens would indeed be surrendered. Asked by a lower court to judge upon the constitutionality of this article, the PCT concluded that it was not in conformity with Art. 55.1 of Poland's constitution. Perhaps because this judgment seems like a bold violation of the principle of primacy, the PCT also provides a nuanced reasoning.

In important pro-European (integration/law) voice is also incorporated. The PCT namely stated that Poland is under the obligation to implement EU law, that - within certain limits - national law is to be interpreted sympathetically to EU law and that, as a solution to the conflict confronted with, the Polish Constitution ought to be amended. Especially this last statement makes clear that the PCT is aware that national law has to adapt to EU law and not the other way around. As Kowalik phrases it, this shows that the court 'accepted that the Constitution itself was no longer an absolute framework for control - if it hinders the correct implementation of EU law, it should be changed.'⁹ This, combined with the fact that the PCT delayed the entry into force of its judgment in order to give the legislature the opportunity to 'fix the problem', lead her to conclude that the

⁶ D. Chalmers, *European Union Public Law*, Cambridge University Press, 2010, p. 189.

⁷ PCT April 27th 2005, P1/05.

⁸ Council Framework Decision 2002/584/JHA of June 30th 2002 on the European Arrest Warrant and the surrender procedures between member states, O.J. 2002, L 190/1.

⁹ Kowalik, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', 6 German Law Journal 10, p. 1361

PCT ‘used all the means available to it to milder its judgment and allow Poland to continue fulfilling its EU obligations’, thereby implicitly accepting EU law supremacy.¹⁰

When Poland joined the EU in 2004, three groups of parliamentarians in the Polish lower chamber submitted a motion to the PCT on the ground that the Accession Treaty the Polish government signed, conflicted with the nation’s sovereignty and the supremacy of the Constitution over all other legislation in the legal order of the Central-European republic. Although the MPs supported their claim with numerous articles, the PCT ruled that non-conformity had not been demonstrated. At first sight this may seem like a perfectly sound judgment in as far as the supremacy of EU law was at stake here. It is however in this case, rather than in the one discussed in the above paragraph, that the principle of supremacy is in heavy weather, for the mere accepting of the competence to judge on the legality of the Accession Treaty implies that the PCT considers Poland’s Constitution a basis on which to review EU law. The reasoning applied *in casu* may also spark heated discussion. One element is that the PCT states that no international agreement to which Poland is a party can acquire primacy over the Constitution, which is a rather malevolent conception of Art. 8 jo. 9 of the Constitution, which entail that the Constitution is the highest law in the land, respectively that Poland respects provisions of international law binding on it. The PCT does agree that EU constitutes a new model of law but bases on this premise its idea that in case of conflict with the national constitution, recognizing the supremacy of the former is not the solution. Moreover, the PCT was of the opinion that MS were allowed to assess whether EU organs acted within the competences conferred on them, adding that were this was found not to be the case, the principle of primacy did not apply at all.

This judgment is the exact opposite of what had been decided in the *European Arrest Warrant* case two weeks before. Where, the PCT was then willing to hold the effect of its judgment for 18 months - thus ‘waiving’ a constitutional obligation of the state - now the constitution was said to provide an absolute minimum of protection to the Polish citizens. Another difference is that in the judgment delivered a fortnight earlier - and this is related to the other discrepancy - the possibility of altering the Constitution was accepted, while *in casu* this out of the question.

4. Analysis

4.1 Practical relevance

As to the effects on the present-day practice, a question that may come to mind is whether these PCT judgments have not lost relevance with the entry into force of the Lisbon Treaty. As mentioned already, this treaty - albeit by means of an added Declaration - provides a codification of the principle of supremacy. Kumm and Ferreres Comella argue that the principle is now more strongly rooted in EU law and therefore easier to support than just by means of case law. I think this is very probable, however, substantively nothing has changed really; the same principle has just been laid down in a Declaration. Therefore, like Kumm and Ferreres Comella acknowledge, there is still room for

¹⁰ Ibid.

interpretation - and thus conflict - by means of national constitutions.¹¹ Firstly, like the article proposed in the European Constitution, Art. 17 of the Declaration to the Lisbon Treaty does not grant EU law its supremacy status unconditionally; the conditions established in the case law of the ECJ will still have to be respected. Normally, this demand will not give rise to any problems but it does leave room for discourse. Secondly, the Declaration article does not mention the constitutions of MS explicitly and may thus seem to subject only the other laws of MS to EU law. Considering that the core of the debate has evolved around conflict between EU law and constitutional provisions, one might expect that the latter would also be declared subordinate in a more concrete manner.¹² These factors may not lead to a great lot of problems but it appears that despite the codification of supremacy, conflicts on this issue may still arise.

4.2 The Motive of the Polish Constitutional Court

Having taken a close look at the decisions by the PCT and having demonstrated its non-desisting relevance for the practice of EU law, the underlying reasons for the judgments at hand are an interesting object of analysis. In the following, I will try to give an overview as comprehensive as possible taking into account the word limit determined for this paper.

One reason for national (constitutional) courts to interfere in the authority of EU law is that they sometimes have the impression that EU institutions show little respect for the boundaries restricting them to certain competences or areas of policy. Afraid of being overrun by the powerful centralized force in Brussels they try to put a stop the alleged expansion and enforce respect of the boundaries set.¹³

Another concern that is often expressed by national courts and which was also mentioned by the PCT in the *Accession Treaty* case is the protection of human rights. However, with the signing of the Lisbon Treaty, the Charter of Human Rights for the European Union has become binding in all MS except the United Kingdom and, ironically perhaps, Poland. Using the protection of human rights as an argument to infringe upon the authority and primacy of EU law has thus become less convincing.

Moreover, the infamous and much-debated democratic deficit in EU decision/law making may serve as an explanation for national court judgments defying national sovereignty over EU law authority. According to the doctrine and the public opinion, the EU legislative procedures lack a proper possibility for citizens their representatives to give their input, despite the existence of a directly chosen European Parliament (EP). Also mechanisms enabling the public to hold the institutions representing them accountable are absent or at least not firm enough. It is also generally known that many regard the procedures by which EU law is developed as lacking transparency. The argument is built up as follows: because the voice of MS' population is not properly taken into account at central EU level, interests of fundamental importance for national communities may be taken under fire without the citizens affected being able to take

¹¹ Kumm & Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', Jean Monnet Working Paper 5/04, 2004, p. 478

¹² Ibid. p. 479

¹³ 37 BVerfGE 271, 337 (*Solange I*)

effective action. In such a case, some argue, national courts would apply national legislation at the cost of conflicting EU law.¹⁴ It is argued - and it actually seems pretty logical - that with the current steps towards a stronger position for the EP and thus a democratic component, the distrust in the EU on this matter will decline.¹⁵

According to Kumm and Ferreres Comella, the abovementioned grounds for asserting jurisdiction over the authority of EU law are acceptable to the extent that they resolve 'persistent structural deficiencies at the EU level'.¹⁶

Sadurski takes a more general approach to the problem and compares the judgment discussed here with similar decisions issued by other constitutional courts in new (2004 expansion) MS. The argument he makes, is that the negative attitude among constitutional courts that already existed in the 'old', pre-2004 MS has as a natural consequence been adopted by its counterparts in the new, Central and Eastern European (CEE) MS. It is therefore, and this is perfectly in line with the ambiguous picture displayed by the *European Arrest Warrant* and *Accession Treaty* cases, that the arguments brought forward by the several defiant constitutional courts do not neatly point in one direction, and that *in casu* one court delivers two very different judgments within a very short time span. In Sadurski's theory, this is just proof that the CEE constitutional courts are insecure and hesitant in view of their post-2004 position, where they are confronted with claims of superiority of EU law.¹⁷

Sadurski also points out that there is a national or internal dimension to the position of the constitutional courts. For example in the case of Poland, the absence of the rule of law under the Communist regime the country suffered under until 1989 has not been forgotten. Understandably, judges will make sure that the fresh separation of powers combined with democratic checks and balances will not again be endangered by an overenthusiastic executive. In strengthening the position of the judiciary in the national legal-political spectrum, emphasizing the supremacy of the national law is an important asset for it makes clear that the Polish courts are the main guardians of the democratic order. The power to determine whether a constitutional amendment is needed to achieve conformity with EU law also gives the constitutional courts of the CEE MS.¹⁸

This argument relates closely to another reason for the protectiveness of constitutional courts over the sovereignty of their national laws. Kwiecien, apart from stating that rigorous denial ignorance regarding EU law primacy should be regarded as 'simply jealous protection of the supremacy of national constitutional law',¹⁹ argues that constitutional courts also feel obliged to be careful giving up sovereignty to the EU as, for example in Poland, they are mentioned in the constitution as the guardians of that constitution.

¹⁴ Kumm & Ferreres Comella, p. 488

¹⁵ Sadurski, 'Solange, Chapter 3', (2008) 14 European Law Journal 1, p. 30 - 31

¹⁶ Kumm & Ferreres Comella, p. 483

¹⁷ Sadurski, 14 European Law Journal 1, p. 29

¹⁸ Ibid, p. 31 - 32

¹⁹ Kwiecien, 'The Primacy of European Union Law over National Law Under the Constitutional Treaty', (2005) 6 German Law Journal 11, p. 1490

5. Conclusion

Although the judgments considered in the main body of this essay are very different in their reasoning, outcome and relevance, they make clear that the relationship between Polish constitutional law and EU law is an uneasy one. The judgments have in common that they are both of an ambiguous nature, being either 'EU-friendly' as to the substantive decision while conveying a pro-national primacy message or the other way around.

The origins of the critical position of the PCT may vary from a broad range. Where, on the surface, rather formalistic arguments like the protection of human rights and the constitutionally enshrined task of the judiciary to protect the principle of *trias politica* appear to play an important role, deeper analyses learns that arguments that do not belong to the field of European law in the strict sense may also have played a role.

A possible solution may lie in 'the establishment of a neutral institution of judicial or quasi-judicial nature, authorized to express opinion in the event of a constitutional conflict within the EU'.²⁰ An institution of this kind would not be seen as competitor by but rather as an arbiter by the national (constitutional) courts of Member States and as such would have a larger authority and would meet lesser rigid defiance of national supremacy.

Perhaps, though, a solution can be achieved much easier. The currently popular argument against full acceptance of the sovereignty of EU law of the democratic deficit can be combated by through an enhancement of the democratic element in EU decision making. The Lisbon Treaty provides a stronger position for the European Parliament, which will arguably lead to a better understanding of and greater respect for (the authority of) EU law so that national courts will no longer have to protect their citizens from European legislation lacking sufficient democratic legitimation.

²⁰ Schmid, 'The Neglected Conciliation Approach to the "Final Arbiter" Conflict', (1999) 36 CMLR 509, 513 - 514 as paraphrased by Kwiecien in 6 German Law Journal 11, p. 1491

IMPROVEMENT OR ‘GILDING THE LILY’? - THE DESIRABILITY OF INTRODUCING JUDICIAL DISSENT AT THE EUROPEAN COURT OF JUSTICE

Remi van de Calseijde

Abstract: The Judges of the European Court of Justice are currently not entitled to publish dissenting opinions. This paper establishes the advantages and disadvantages of judicial dissent, and then explores whether the introduction of judicial dissent in the European Union would be an improvement over the existing situation or an ‘unnecessary ornament’.

1. Introduction

The Judges of the European Court of Justice are not, and never have been, permitted to publish dissenting opinions. The Court operates under the principle of collegiality, meaning that in a case a single judgment is given which is signed by all Judges presiding over the case at hand.¹

Many international courts and tribunals, such as the International Criminal Court, the International Court of Justice, the International Tribunal for the Law of the Sea and notably the European Court of Human Rights do allow their judges to write dissenting opinions.² Apart from these international courts, many national courts, both in the European Union and outside, allow their judges to write concurring and dissenting opinions. Especially in Common law jurisdictions, the dissenting opinion is a common judicial instrument.³ Dissenting opinions are, however, also found in the courts of states adhering to the civil law tradition. Most times, in these states, judicial dissent is limited to higher courts.⁴ We can therefore conclude that the appearance of judicial dissent can not exclusively be explained by the factual differences between common and civil law. It is clear however, that the legal basis of the European Court of Justice (henceforth: ECJ) has a firm foundation in the civil law tradition and that there rests a certain taboo on the abolishment of the prohibition on the publication of dissenting opinions.⁵ This paper seeks to explore the reasons for this taboo and to examine whether having and publishing dissenting opinions would be an improvement over the existing situation, whether this could actually lead to democratization of the judicial process in a time when the European Union as a whole is criticized for lacking democracy in its judgment procedure.⁶ To discuss these points, it will also be necessary to examine briefly the position of the Advocate General at the Court, to see whether the role he fulfils would

¹ D. Chalmers, G. Davies & G. Monti, *European Union Law*, (Cambridge University Press, 2010) p145.

² J. Laffranque, ‘Dissenting Opinion in the European Court of Justice – Estonia’s Possible Contribution to the Democratisation of the European Union Judicial System’, IX *Juridica International*, (2004) p15.

³ V. Grementieri & C. Golden, ‘The United Kingdom and the European Court of Justice: an Encounter between Common and Civil Law Traditions’, 21 *The American Journal of Comparative Law*, 4 (1973) p664.

⁴ J. Laffranque, ‘Dissenting Opinion and Judicial Independence’, VIII *Juridica International*, (2003) p162.

⁵ J. Laffranque, IX *Juridica International*, (2004) p15.

⁶ *Ibid.*

make the introduction of dissenting opinions an ‘unnecessary ornament’ in the current judicial process.

2. *The Dissenting Opinion – Definition and Presence*

Dissenting opinions have a long history of existence in the courts of common law nations. Ever since the 17th century, majority voting had been the preferred way of decision-making in these courts.⁷ Judges who disagreed with the final verdict in a case made their opinion known by writing a dissenting opinion, whilst judges agreeing with the outcome, but coming to a similar conclusion by different reasoning, would write a concurring opinion.⁸ The practice of judicial dissent was considered an advance of the application of reason to judicial matters, since the authority and weight of an expert reporting his findings was considered a better authority than the final or formal authority of an official whose authority is derived from the mere fact that ‘his saying makes it so’.⁹ At the basis of this concept lies the fact that in a common law court, the judges decide *seriatim* (individually).¹⁰ This is not the case in the United States, where this practice was abolished at the end of the 18th century and replaced by a system where the majority of judges agreeing on the case would draft a single judgment together, whilst others are still at liberty to draft separate concurring and dissenting opinions.¹¹

The aforementioned may lead to the perception that dissenting opinions are an exclusive characteristic seen in the national courts’ jurisprudence in states of the Anglo-American common law family. This assumption is incorrect since in early Roman legal procedures, the cradle of the civil law system, judgments were deliberated in public. However, in later Roman and canonist procedures, preference was given to secrecy of deliberations and results of the judges’ voting.¹² This could have resulted in a total absence of judicial dissent in those legal systems that are based upon Roman and canonical law. Nevertheless, civil law states such as Germany, Spain, Portugal, Greece, Italy¹³, Switzerland, Norway, Sweden, Finland and Estonia know the dissenting opinion, although most times in a more restricted sense than most common law states.¹⁴ Judicial dissent is however not as ubiquitous in civil law jurisdictions as the numerous countries listed before might suggest. It rarely has a role of importance in those jurisdictions where it exists and is often only allowed in ‘higher courts’.¹⁵ Dissenting opinions are completely absent in the courts of ‘hard core’ civil law nations such as France, Belgium, The Netherlands and Austria.¹⁶

⁷ J. Alder, ‘Dissents in Courts of Last Resort: Tragic Choices?’, 20 Oxford Journal of Legal Studies 2, (2000) p221.

⁸ H. Schermers & D. Waelbroek, *Judicial Protection in the European Union*, (Kluwer Law International, 2001) p736.

⁹ J. Alder, 20 Oxford Journal of Legal Studies 2, (2000) 221.

¹⁰ J. Laffranque, VIII Juridica International, (2003) p162.

¹¹ Ibid.

¹² K. Nadelmann, ‘The Judicial Dissent: Publication v. Secrecy’, 8 The American Journal of Comparative Law 4, (1959) p415.

¹³ The existence of judicial dissent in Italian courts is disputed by Laffranque (2003).

¹⁴ J. Alder, 20 Oxford Journal of Legal Studies 2, (2000) p221. ; V. Grementieri & C. Golden, 21 The American Journal of Comparative Law 4, (1973) p664. ; J. Laffranque, IX Juridica International, (2004) p15.

¹⁵ J. Laffranque, IX Juridica International, (2004) p15.

¹⁶ J. Laffranque, VIII Juridica International, (2003) p162.

Whereas in common law legal systems the courts show the individual judge's considerations (*seriatim*) in the judgment, the judges in France operate anonymously under strict adherence to the principle of collegiality and secrecy of deliberations.¹⁷ The absence of dissenting opinions in the French courts is of particular importance, since the judicial branch of the European Union is based to a large extent on the French legal system and the ECJ is modeled on the French *Conseil d'État*.¹⁸ The proceedings, and drafting and style of judgments are all derived from the French model.¹⁹

Concluding, judicial dissent permits a judge disagreeing with the majority judgment to publish his or her dissenting opinion. The dissenting opinion is far more seldom in civil law tradition than in common law jurisdictions, where it is an integral part of the judicial system in most nations. The fact that the European Union judicial system is based on the French 'civil law' system explains the lack of judicial dissent at the European Court of Justice. In order to establish whether the introduction of judicial dissent would be an improvement of the current system employed at the ECJ, it is first necessary to look at the advantages and disadvantages of judicial dissent on an abstract level.

3. *The Dissenting Opinion – Advantages*

Judicial dissent is a commonplace characteristic of a large number of jurisdictions. This is not without reason, since it has certain advantages. A few major arguments in favor of judicial dissent may be distinguished and will be explored below.

Firstly, dissenting opinions could improve quality and reasoning of the final judgment, by creating 'pressure' on judges to formulate their judgments precisely. Since more arguments, both in favor and against, are published, the final judgment is likely to be more detailed and to explain why certain arguments are refuted. At the same time, arguments on which no agreement can be reached are less likely to be kept out of the judgment, since they are likely to be brought up in a dissenting opinion.²⁰ The greater plurality of arguments will lead to mistakes being prevented in both the case at hand and future judgments.²¹ One could thus argue that dissenting opinions might improve both the final judgment and the future development of law. The dissenting opinion of today might be the basis for the majority opinion of tomorrow, or even lead to new legislation to improve an existing undesirable situation. The conclusion of this argument is twofold; dissenting opinions serve both as a 'safety valve' in the case being litigated and will also positively affect the quality of future judgments.²² Secondly, dissenting opinions may help

¹⁷ J. Laffranque, VIII *Juridica International*, (2003) p162. ; J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

¹⁸ J. Laffranque, IX *Juridica International*, (2004) p15. ; L. Brown & T. Kennedy, *The Court of justice of the European Communities*, (Sweet & Maxwell, 1995) p52 and p260-261. ; A. Arnulf, *The European Union and its Court of Justice*, (Oxford University Press, 1999) p8. ; J. Komárek, 'Questioning Judicial Deliberations', 29 *Oxford Journal of Legal Studies* 4, (2009) p817.

¹⁹ T. Heartley, *The Foundations of European Community Law*, (Oxford University Press, 2007) p52 and p71. ; M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court', 4 *International Journal of Constitutional Law* 4, (2006) p618. ; V. Perju, 'Reason and Authority in the European Court of Justice', 49 *Virginia Journal of International Law* 2, (2009) 308.

²⁰ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p736.

²¹ J. Laffranque, VIII *Juridica International*, (2003) p162.

²² J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

strengthen the courts' reputation by exposing what people actually already know: that there is no consensus in courts. By allowing and publishing dissenting opinions and thus improving transparency, not only litigants, but also the public at large will have a better knowledge of the courts' proceedings and deliberations. Demystifying the judgment phase of court proceedings, might thus actually help establish and uphold the courts' authority to the general public. For litigating parties there might be comfort in a dissenting opinion because it shows them that on the bench there are also judges agreeing with them and taking their point of view into consideration. Both aspects could have a positive effect on the legitimacy of the court.²³

Thirdly, judicial dissent could strengthen the position of the individual judge, both in court and in public.²⁴ Whereas a critic might argue that judicial dissent could make the position of the judge more 'political', one should also consider that by enlarging the judge's answerability as an individual, his or her position on the bench is strengthened. The prospect of a possible dissenting opinion will lead to a open discussion, in which all members of the court will be treated equally and due time is given to all relevant points of view. Dissent, instead of having negative implications of the principle of collegiality, might actually have a positive effect because majority decision making does not benefit from the suppression of minority opinions when compared to the need for consensus under unanimity.²⁵

Another argument in favor of dissent is that dissent embodies traditional principles of freedom of conscience and expression, held dearly as a 'basic human right',²⁶ in most democratic states.²⁷ As such, it would be strange to forbid judges to exercise these freedoms within a court of law.

Given the fact that there are several arguments in favor of dissent, it seems odd that the Judges of the European Court of Justice are prohibited to publish separate dissenting opinions. To establish why this is the case, and whether it would be a good thing to introduce judicial dissent at the ECJ, it is necessary to explore the disadvantages of dissent as well.

4. *The Dissenting Opinion – Disadvantages*

The publication of separate dissenting opinions is not without its disadvantages. These will be set out below.

Firstly, the usefulness of the practice of dissent is disputed by looking at the effect it has on judgments given by the courts. It is believed by some that the mere appearance of the practice of dissent creates uncertainty and weakens legal certainty. Common law authors have argued that dissent has an adverse effect on the doctrine of *stare decisis*, which places enormous importance on previous judgments. Dissenting opinions would invalidate the rock solid confidence litigants are supposed to have in the previous case law in common law jurisdictions.²⁸ The judgment loses its status as 'final decision' of a

²³ J. Laffranque, VIII *Juridica International*, (2003) p162.

²⁴ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p736.

²⁵ J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

²⁶ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p736.

²⁷ J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

²⁸ J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

court and this status is replaced by the less persuasive status of majority or minority opinion.²⁹

A second major argument against dissent is that dissent on an abstract level creates an image of division, reducing not only legal certainty, but also having a detrimental effect on the confidence of the general public and litigants in the court.³⁰ Dissent could 'endanger the authority prestige and legitimacy of the court'; even though people should already know that there are different opinions in courts in any case. The simple fact that these differences of opinion could appear 'out in the open' in the judgment itself, might endanger a court's credibility³¹, since the mere 'appearance of unanimity', as opposed to factual unanimity, is believed to boost authority of and confidence in the court. This is regarded especially true in the cases of international courts and tribunals, which have to deal with a lower public approval due to the perceived distance between the court and the general public.³² In the case of the ECJ, it is believed that had the Court's (hypothetical, but not unlikely, given the Advocate General's opinion) 'split' in the seminal case *Van Gend en Loos*³³ been known publicly, the Court's authority might not have been what it is today.³⁴ It is generally accepted that much of the Court's success in pursuing an integrationist agenda in its foundational period can be attributed to the fact that the Court maintained a relatively low profile and preserved neutral image. It is highly questionable whether the Court would have been as effective if its members were allowed to write dissenting opinions.³⁵

A third argument against dissent is that it places too much emphasis on the position of the individual judge delivering a dissenting opinion;³⁶ it makes the dissent too closely connected to the judge's person.³⁷ Not only could this result in the judge feeling obliged to stand by his or her opinion in a later case, thus being deprived of independence to a certain extent, litigants and the general public might also assert certain expectations regarding his or her views, further depriving him of independence.³⁸ If the court's deliberations are not known to the public, under a rigid interpretation of the principle of collegiality, such secrecy could protect the individual judges against political interference and pressure. This, again, is especially true in cases of international courts and tribunals.³⁹ For example, currently at the European Court of Justice, Member States can not point out 'sympathetic opinions' from 'their' national judge.⁴⁰

A fourth disadvantage of judicial dissent is the fact that judges might misuse their discretion to gain attention, thereby politicizing their own position, in an attempt to

²⁹ J. Laffranque, VIII *Juridica International*, (2003) p162.

³⁰ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p737.

³¹ J. Laffranque, VIII *Juridica International*, (2003) p162.

³² J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

³³ Case 26/62 *Van Gend & Loos* [1963] ECR 1.

³⁴ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p738. ; V. Perju, 49 *Virginia Journal of International law* 2, (2009) p308.

³⁵ V. Perju, 49 *Virginia Journal of International law* 2, (2009) p308.

³⁶ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p737.

³⁷ J. Laffranque, VIII *Juridica International*, (2003) p162.

³⁸ H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p738.

³⁹ J. Alder, 20 *Oxford Journal of Legal Studies* 2, (2000) p221.

⁴⁰ D. Chalmers, G. Davies & G. Monti, (Cambridge University Press, 2010) p145.

secure a prominent position on the bench.⁴¹ This is again a result of placing too much emphasis on the person delivering the dissenting opinion, and the principle of collegiality would be at stake in such cases.

A fifth major disadvantage attributed to judicial dissent is the internal division such practice could create in a court. Although it has been argued that majority decision-making could actually benefit from dissenting opinions, because these opinions would challenge the majority to properly underpin their judgment and not to skip parts that they cannot find consensus on, others suggest that is the fact that the courts deliberations are not known to the public and litigants which allows judges to act properly independent. They argue that it is this secrecy, under the principle of collegiality, which allows for judges to speak freely and (in case of the European Court of Justice) for the court to benefit from an ‘amalgamation of rules from all the national legal orders’ and their assimilation in the courts judgments. ‘Opening up’ the judgment procedure by introducing dissenting opinions would hinder this approach from the court.⁴²

Lastly, the sheer purpose of a dissenting opinion is doubted by some, since the minority opinion is quite simply the opinion that is not regarded as desirable by the majority of judges and thus a dissenting opinion would have only academic relevance, as opposed to having any legal consequences.⁴³

Concluding, one must notice that when comparing advantages and disadvantages of dissenting opinions, both sides make use of up to a large extent similar argumentation, emphasizing the importance of the quality of judgments, legitimacy of the court, and the effects on the position of the individual dissenting judge, but differ in the conclusions they draw. In an exception; arguments against judicial dissent rarely mention the ‘democratic value’ of the dissent.

5. *The Role of the Advocate General – Comparable to Judicial Dissent?*

Despite the fact that judicial dissent is officially prohibited under Article 27 of the Rules of Procedure of the Court of Justice⁴⁴, on a French initiative the position of the Advocate General was established, to compensate for the lack of judicial dissent. The Advocate General’s role is, like most of the foundations of the European Court of Justice derived from the French *Conseil d’État*. At the *Conseil*, there is the position of *Commissaire du Gouvernement*, whose position served as a blueprint for the Advocate General’s position. The French were, and are, firm opponents of judicial dissent, hence their proposal for an alternative solution.⁴⁵ Much of the success of the European Court of Justice is attributed to the fact that the Court in its early days managed to maintain a position of neutrality while pursuing an agenda aimed at integration. It is doubted whether the ECJ could have

⁴¹ J. Laffranque, VIII *Juridica International*, (2003) p162. ; H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p738.

⁴² D. Chalmers, G. Davies & G. Monti (Cambridge University Press, 2010) p145.

⁴³ J. Laffranque, VIII *Juridica International*, (2003) p162.

⁴⁴ Article 27 (1) and 27 (5) of the Rules of Procedure of the Court of Justice lay down that the Court deliberates in a closed setting and that the majority is determinant for the judgment. It follows from these paragraphs that no dissenting opinions are permitted, although they are not literally prohibited in the provisions stated.

⁴⁵ J. Laffranque, IX *Juridica International*, (2004) p15.

been as successful if this neutrality was not secured by single judgments, but its members were instead allowed to write separate legal opinions.⁴⁶

The six founding Member States of the ECSC all had a strong continental, civil law connection and thus there was little critique of the French position. Even after Members States joined who did have a (strong) connection with judicial dissent, such as Greece or the United Kingdom, the position of the Advocate general was never reconsidered to make way for judicial dissent, even though the position and role of the Advocate General are completely unknown in a common law jurisdiction such as the United Kingdom.⁴⁷

As regards the role of the Advocate General, he advises the Court by giving reasoned submissions on cases brought before the ECJ⁴⁸ and his statements are published along with the Court's opinion. In the absence of judicial dissent, his conclusions are considered dissenting opinions when they are not adopted by the Court in its judgment.⁴⁹ This form of dissent can, however, not be considered an equivalent of judicial dissent, since the Advocate General does not participate in the deliberations of the Court, the drafting of the judgment, and does not sit 'on the bench' during the case. The main difference between the Advocate General's opinion and a dissenting opinion given by a judge is that the judge delivers his dissenting opinion in response to a judgment with which he does not agree and the Advocate general gives his opinion beforehand as a recommendation to the Court. The fact that, with hindsight, his opinion when different from the judgment, is considered as an equivalent to a judge's dissent is therefore factually incorrect. It is the Court which does not follow his recommendations in their ruling, instead of him disagreeing with a decision taken by the Court. It should be noted that the Advocate General is at liberty to criticize an earlier decision taken by the Court whilst delivering his opinion in a new case, but this can not be considered an equivalent to judicial dissent since he must do so in a 'new' case, before a judgment in that case is given.⁵⁰ Whilst an Advocate General is given a lot of discretion to write his opinion, enabling him to operate independently of a collegiate Court, and essentially free to criticize the Court on its previous decision, in the end it is the judgment of the Court in the case at hand which determines whether his opinion is dissenting or concurring. Since the Advocate General's position was originally created to take the place of judicial dissent at the European Court of Justice, one can conclude that the value of an Advocate General's opinion, as an alternative to a judge's dissenting opinion, is rather limited.

6. *Introducing Dissenting Opinions at the ECJ*

Considering that the Advocate General is supposed to be the European Union's alternative for the dissenting opinion, but not really a full equivalent, it seems appropriate to discuss whether judicial dissent should be introduced next to, or in place of the role currently fulfilled by the Advocate General. This would in any case require a remodeling

⁴⁶ V. Perju, 49 *Virginia Journal of International Law* 2, (2008) p308.

⁴⁷ V. Gremienterei & C. Golden, 21 *The American Journal of Comparative Law*, 4 (1973) p664.

⁴⁸ Article 252 TFEU.

⁴⁹ J. Laffranque, IX *Juridica International*, (2004) p15.

⁵⁰ J. Laffranque, IX *Juridica International*, (2004) p15.

of Article 27 of the Rules of Procedure of the Court of Justice, which lays down the procedure for deliberations by the Court.

Lafranque mentions possible additions and changes to Articles 2, 27, 36, and 63 as possibilities to introduce judicial dissent. No change to the text of the Treaty on the European Union or Treaty on the Functioning of the European Union would be required.⁵¹

Now that the possibility of the introduction of judicial dissent is established, it is necessary to consider whether such a change is desirable and/or necessary. To establish the desirability and necessity, one must take account of the advantages and disadvantages of dissent mentioned before and establish what the effects on the procedure and judgments in the European Court of Justice would be. Both the external effects and the internal effects need to be considered in this respect.

Considering the external effects, it has already been mentioned that the relative success of the Court in its founding days is largely attributed to the fact that single concise judgments were given, successfully establishing the Court's authority and legitimacy.⁵² More than any national court, the ECJ must have solid authority, since the distance to the general public might easily lead to disapproval and discomfort with the Court's supranational position.⁵³ It might be doubted whether the Court has by now established sufficient authority and legitimacy to be able to withstand critique by the general public originating from discomfort with judicial dissent, since the last decade of European integration is characterized by Euro skepticism in many of the Member States. Propagators of judicial dissent have argued that it only confirms what people already know: that there is no consensus in the Court. In this respect, judicial dissent might lead to greater transparency improving legitimacy and authority of the Court. But it is questionable whether the desired effect could actually be achieved, since the inevitable politicization following these changes is likely to have a negative effect on the Court's independency.

The Court's and Judges' independency, another important external factor, are also to be considered. Whilst pressure from national governments on 'their' Judge is not so likely, pressure from the national public opinion is not to be underestimated.⁵⁴ The secrecy of deliberations and principle of collegiality have until now, been fairly successful in preserving both the neutrality of the Court itself and the individual Judges. If judges would become more independent actors by means of their dissents, it is only logical that pressure on their personae would rise. Whether the demystification of the proceedings would be worth such a sacrifice is questionable.

One of the internal effects of dissent would be that dissenting opinions might lead to better judgments (this has an external effect as well) by forcing the majority to properly scrutinize their judgment in fear of a vigorous dissent. Given the fact that at present times, the judgments are often very short and not sufficiently clear for the litigants due to the secrecy of deliberations, this could actually be an aspect where judicial dissent could improve the situation at the ECJ.⁵⁵ Especially when one takes into account that majority decision-making benefits from a complete absence of barriers to

⁵¹ J. Laffranque, *IX Juridica International*, (2004) p15.

⁵² V. Perju, 49 *Virginia Journal of International Law* 2, (2008) p308.

⁵³ H. Schermers & D. Waelbroek, (*Kluwer Law International*, 2001) p737.

⁵⁴ H. Schermers & D. Waelbroek, (*Kluwer Law International*, 2001) p738.

⁵⁵ H. Schermers & D. Waelbroek, (*Kluwer Law International*, 2001) p736.

take account of different points of view, one can conclude that the process itself could be improved by introducing dissenting opinions.⁵⁶

The freedom of conscience and expression of the individual Judge, embodied by the power to dissent, would be a good ground for the introduction of dissent on moral grounds.

Whether introducing dissent at the ECJ would lead to a decline in legal certainty is questionable. Given the fact the Court's position is firmly founded in civil law, there is already a lack of *stare decisis*, permitting the Court to depart from previous case law where it sees fit. The individual dissent would certainly increase exposure, but it is unlikely that the practice of dissent would cause the ECJ to depart from previous case law.⁵⁷

The argument that judges might use their dissent to gain attention is difficult to assess. Advocates General already have been in the spotlight when it came to their sometimes controversial opinions, but a case of a Judge deliberately doing this seems less likely.⁵⁸ Judges would still operate under the principle of collegiality and are thus less independent than Advocates General.

Lastly, the dissent would adversely affect the secrecy of deliberations; in contrast, it is likely to expose a lot of these deliberations. It has already been demonstrated that it is exactly the secrecy of deliberations that allows for a several points of view to flourish during deliberations and the drafting of the judgments, and allows for implementation of legal reasoning and methods from various Member States. If this is taken away by the introducing the power of dissent, it might be argued that the quality of judgments might actually be adversely affected by introducing dissent.

7. Conclusion

The introduction of judicial dissent at the European Court of Justice could improve the quality of judgments, judicial independency, and transparency of proceedings and embody the freedom of conscience and expression.

Presently, dissent is sometimes performed by the Advocate General, although his opinion, can never really be considered a complete alternative to a judge's dissenting opinion. When considering the introduction of dissent and taking into account its advantages and disadvantages, it becomes apparent that judicial dissent might sometimes produce unwanted results and even 'destroy' the very work that it attempts to create. Previously, the ECJ has been able to do some of its most important work because it preserved a neutral and unified image to the general public, litigants and Member States. Dissenting opinions would make this more difficult. Further research is necessary to establish in what way judicial dissent might best be employed in the European Court of justice, taking into consideration the role of the Advocate General. It is questionable whether the current Euroskeptical climate of the present time is favorable towards the appearance of dissenting opinions at the European Court of Justice. The introduction of

⁵⁶ J. Alder, 20 Oxford Journal of Legal Studies 2, (2000) p221.

⁵⁷ V. Gremetierei & C. Golden, 21 The American Journal of Comparative Law 4, (1973) p664.

⁵⁸ J. Laffranque, VIII Juridica International, (2003) p162. ; H. Schermers & D. Waelbroek, (Kluwer Law International, 2001) p738.

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dissenting opinions would lead to some major changes in the role of Judges at the European Court of Justice. It can therefore not be considered an 'unnecessary ornament' in European Law, but whether it would be an improvement is difficult to foresee.

JÉGO-QUÉRÉ AND UPA: WAS THE ECJ RIGHT OR WRONG?

Agnieszka Kilanowska

Abstract: Despite strong pressure from scholars and critical opinions of the Advocate General Jacobs and the Court of First Instance, the European Court of Justice is reluctant to relax the locus standi requirements for individuals seeking to annul measures of the European Union. An examination of case law of the Court, namely *Jégo-Quéré & Cie SA v. Commission* and *Unión de Pequeños Agricultores v. Council of the European Union*, reveals that the strict test for individual concern adopted as early as in 1963 in *Plaumann & Co. v Commission* remains in force. An analysis of the validity of arguments for such interpretation of the Article 263 TFEU by the ECJ proves that it is high time for reform. Unfortunately, neither the Court nor the Member States show willingness to initiate it. The amendment introduced by the Lisbon Treaty fails to provide a complete solution to the problem. As a result, restricted access of individuals to justice and lack of effective legal protection continue to be an unresolved issue.

1. Introduction

In both *Jégo-Quéré & Cie SA v. Commission* and *Unión de Pequeños Agricultores v. Council of the European Union*, the European Court of Justice refused yet again to substantially relax the conditions for the admissibility of cases for annulment of a European Union measure initiated by individuals under what is now Article 263 TFEU.¹ Few issues of the European law have been as severely criticized as the problem of locus standi of private parties and its interpretation by the ECJ, which is said to undermine the principle of access to justice. In the light of that criticism, it might come as a surprise that the opinion of the Court remains almost unaffected.

The present article will attempt to provide an outline of the possible reasons that might have had an impact on the final outcome that the Court of Justice reached, as well as an argumentation proving why a more relaxed approach to the standing of individuals, be it natural or legal persons, under Art. 263 TFEU shall be preferred. For that purpose, a legal analysis of the relevant *acquis communautaire*, particularly the case law concerning the *locus standi* needs to be conducted. Next to the pertinent primary sources, a number of arguments formulated by the legal scholars will serve to support the thesis that the ECJ should have adopted a different view.

The first part will examine general requirements for standing of individual applicants, based on the state of law on individual concern before the *Jégo-Quéré* and *UPA*. In that light, a thorough analysis of the two cases will be presented. Then, the rationale behind the Court's strict interpretation of Article 263 TFEU will be investigated. The arguments in favour of the ECJ's decision will be counterbalanced, if not rebutted, in

¹ Both *Jégo-Quéré & Cie SA v. Commission* and *Unión de Pequeños Agricultores v. Council of the European Union* were decided before the entry into force of the Treaty on Functioning of the European Union in its present form; for the purpose of clarity all the references are made in accordance with the new numeration.

the subsequent part. Finally, a closer look will be taken on the amendments introduced by the Treaty on the Functioning of the European Union.

2. Locus standi – *The Notion of Individual Concern*

The position of the Court towards the standing of private parties wishing to institute proceedings under Article 263 TFEU was and remains very strict.² It is particularly visible in the discussion regarding the individual concern.³ A natural or legal person not directly addressed in a decision can challenge a measure of the European Union solely under condition that he is able to establish that the act in question is of direct and individual concern to him.⁴ The notion of individual concern entails that an individual must be affected in a manner that distinguishes him individually as if he was the addressee of EU measure.⁵ The meaning of the term is strictly technical and deviates from the one attributed to it in the everyday usage.⁶ Thus, establishing individual concern shall not depend on a possibility of identifying a number of persons to whom a measure applies.⁷ The test used by the Court was adopted in *Plaumann v. Commission*.⁸ It requires that persons willing to rely on the direct access to the ECJ prove that ‘decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons’.⁹ According to the formula, not only is it necessary to prove that one belongs to a closed group affected by a measure, but also that no new members could join the group in the future.¹⁰

3. *Unión de Pequeños Agricultores v. Council of the European Union*

In the *UPA* case a Spanish association of farmers *Unión de Pequeños Agricultores* appealed against a decision of the Court of First Instance, which denied it access to the Court. The CFI came to a decision that the *UPA* members were not individually concerned, thus they could not seek an annulment of the Regulation No 1638/98.¹¹ The Advocate General Jacobs delivered an extensive opinion to the Case, discussing almost exclusively policy matters.¹² He concentrated on the issue of individual concern, favouring a more relaxed approach to the requirement of individual concern. The Advocate General Jacobs structured his opinion around the need for effective judicial

² A. Arnall, *The European Union and its Court of Justice*, (Oxford University Press, 2006), 69.

³ *Ibid.*

⁴ K. Lasok, T. Millet, *Judicial Control in the EU: Procedures and Principles*, (Richmond Law & Tax, 2004), 53.

⁵ R. Gordon, *EC Law in Judicial Review*, (Oxford University Press, 2007), 88.

⁶ S. Enchelmaier, ‘No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230 (4) EC’, in P. Eeckhout (ed.), *24 Yearbook of European Law*, (Oxford University Press, 2005), 178.

⁷ *Ibid.*

⁸ L. Gormley, ‘Judicial Review: Advice for the Deaf?’ 29 *Fordham International Law Journal* 4 (2006), 659.

⁹ Case 25/62, *Plaumann v. Commission* [1963], at para. 47.

¹⁰ T. Corthaut, ‘Case CFI May 3, 2002, *Jégo-Quéré v. Commission*, T-177/01 and C-50/00 P ECJ July 25, 2002, *Unión de Pequeños Agricultores v. Council*’, 9 *Columbia Journal of European Law* 1 (2002), 142.

¹¹ Case C-50/00 P, *Unión de Pequeños Agricultores v. Council* [2002], AG Jacobs, at para. 1.

¹² T. Hartley, *The foundations of European Community Law*, (Oxford University Press, 2007), 356.

protection in the European Union.¹³ He came to a conclusion that the ECJ's assumption that individuals can rely on the preliminary ruling procedure does not implicate full judicial protection in a number of situations, e. g. when there are no implementing measures or when the national court decides not to refer a measure that the applicant would like to challenge.¹⁴

However, he dismissed a possibility of granting direct access to the Court when an applicant could not use a reference for preliminary ruling under his national law.¹⁵ In the view of Advocate General Jacobs, it would give a comparative advantage to some citizens at the same time obliging the ECJ to fulfil an unfeasible task of interpreting the national rules, for which it has no competence.¹⁶ Moreover, it does not seem to be intended by the wording of the Treaty.¹⁷

A further reaching solution, i.e. shifting the responsibility to ensure effective judicial protection on the Member States was also denied as it would infringe the rule of procedural autonomy, would be complicated to enforce or scrutinize and not necessarily more effective.¹⁸ The critique of the Advocate General is so comprehensive that it can be deduced that he perceives participation of the national courts in the control of legality of the EU measures as a weakness itself.¹⁹

All things considered, the Advocate General Jacobs suggested a new test – substantial adverse effect test, according to which an applicant is individually concerned if a Community measure ‘has, or is liable to have, a substantial adverse effect on his interests’.²⁰ It is a simple test which would grant more general access to the ECJ, hence furthering the requirements of the principle of effective judicial protection.²¹ That would allow the Court to concentrate on the substance of the proceedings, instead of analyzing the formal issue of admissibility.²² Advocate General states that the new version of the test recommended by him is in line with the tendency to broaden the scope of application of Art. 263 TFEU through case law, as for example in *Chernobyl*.²³ He dismissed all the potential counterarguments and proved that it is high time for a reform of the concept of the individual concern.²⁴

The ECJ refused to follow the substantial adverse effect test and the argumentation of the Advocate General. It based the ruling on the test formulated in *Plaumann* and argued that the applicant did not fulfil the requirements of being affected by a measure because of some specific characteristic particular to it or factual conditions that would in some manner distinguish the *UPA*.²⁵ The Court reiterated its previously established view that if a party fails to fulfil the *Plaumann* requirements, under no circumstances could they have standing under Article 263 TFEU.²⁶

¹³ P. Craig, *EU Administrative Law*, (Oxford University Press, 2006), 335.

¹⁴ Case C-50/00 P, AG Jacobs, at para. 102 (1).

¹⁵ Case C-50/00 P, AG Jacobs, at para. 102 (2).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Case C-50/00 P, AG Jacobs, at para. 102 (3).

¹⁹ S. Enchelmaier, *24 Yearbook of European Law*, (Oxford University Press, 2005), 202.

²⁰ Case C-50/00 P, AG Jacobs, at para. 60.

²¹ Case C-50/00 P, AG Jacobs, at para. 63.

²² Case C-50/00 P, AG Jacobs, at para. 66.

²³ Case C-50/00 P, AG Jacobs, at para. 68.

²⁴ Case C-50/00 P, AG Jacobs, at paras. 102 (5)-102 (6).

²⁵ Case C-50/00 P, at para. 36.

²⁶ Case C-50/00 P, at para. 37.

The ECJ further held that the Treaty established a comprehensive system of remedies for challenging a measure of European law.²⁷ It is therefore a task of the national courts to ensure that effective judicial protection is guaranteed.²⁸ It declined, however, a possibility of bringing an action before the ECJ when there is no available remedy on the national level, for reasons similar to those presented in the Advocate General's opinion.²⁹ Finally, the Court invited the Member States to amend the Treaty so that it provides more effective judicial protection, if they perceive that as necessary.³⁰

4. *Jégo-Quéré & Cie SA v. Commission*

Jégo-Quéré, a French fishing company, sought to annul Regulation 1162/2001 aiming at the protection of environment by prohibiting the use of certain fishing nets.³¹ The case was adjudicated by the Court of First Instance soon after the opinion of Advocate General Jacobs in *UPA* was delivered and the outcome reached by the CFI was without a doubt inspired by his views.³² The CFI expressed a belief according to which the conditions for access to justice of the individuals shall be relaxed.³³ The Court of Justice, yet again, did not share that observation.³⁴ It is because of those conflicting approaches adopted first by the CFI and then by the ECJ on appeal that this case is so significant.³⁵

The CFI established that the provisions challenged by *Jégo-Quéré* were of general nature, which meant that direct and individual concern had to be proved on the part of the applicant.³⁶ While the requirements of direct concern were satisfied, *Jégo-Quéré* did not fulfil the criteria for individual concern, as set by the Court in *Plaumann*.³⁷ Furthermore, the Court reflected on the issue of judicial protection under the *acquis communautaire*.³⁸ It came to a conclusion that combination of Articles 263, 267, 268 and 340 (2) TFEU do not constitute a fully effective system of remedies offered to individuals who seek to contest legality of a measure.³⁹

Nevertheless, the CFI declined a possibility of bringing an action for annulment when the conditions stipulated in Article 263 TFEU are not fulfilled, namely the applicant is not directly and individually concerned. Such practice is forbidden even in cases where the applicant would be otherwise left with no remedy available.⁴⁰ Instead, the Court decided to reconsider the notion of individual concern, which, as it stressed, is not defined in the Treaty.⁴¹ Subsequently, new test for individual concern was suggested. It

²⁷ Case C-50/00 P, at para. 40.

²⁸ Case C-50/00 P, at para. 41.

²⁹ Case C-50/00 P, at para. 43.

³⁰ Case C-50/00 P, at para. 45.

³¹ Case C-263/02 P, *Commission v. Jégo-Quéré et Cie SA* [2004], at para. 1.

³² T. Corthaut, 9 *Columbia Journal of European Law* 1 (2002), 157.

³³ Case T-177/01 *Jégo-Quéré et Cie SA v. Commission* [2002], at para. 50.

³⁴ Case C-263/02 P, at para. 52.

³⁵ E. Legere, 'Locus Standi and the Public Interest: A Hotchpotch of Legal Principles', 10 *Judicial Review* 2 (2005), 132.

³⁶ Case T-177/0, at paras. 24 and 25.

³⁷ Case T-177/0, at paras. 26-38.

³⁸ Case T-177/0, at paras. 41-46.

³⁹ Case T-177/0, at para. 47.

⁴⁰ Case T-177/0, at para. 48.

⁴¹ Case T-177/0, at paras. 49-50.

reads as follows: ‘a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’.⁴² According to that formula, the number or legal position of other persons affected, actually or potentially, by the same measure is of no relevance.⁴³ Applying the new test to the facts of the case, the Court reached the final conclusion that Jégo-Quéré was individually concerned.⁴⁴

As could be expected, the ECJ overturned the ruling of the Court of First Instance.⁴⁵ Instead, it favored its previous decision in *UPA*, hence denying any relaxation of the test of individual concern.⁴⁶ Even though it acknowledged the right to effective judicial protection, it merely repeated that such right is granted on the European level and that a complete system of remedies is in place.⁴⁷ However, the responsibility to ensure an appropriate judicial protection lies with the Member States, not the Union.⁴⁸ Additionally, they are obliged to act in accordance with the principle of sincere cooperation as stipulated in what is now Article 4 (3) TEU.⁴⁹

The Court stressed that it would not allow actions based solely on the grounds that the national system does not offer remedy, even if the applicant had to disregard the national legal rules in order to seek redress.⁵⁰ At the same time, it observed that the interpretation of the individual concern proposed by the CFI renders the concept itself obsolete, depriving it from its entire sense.⁵¹ The final conclusion was thus based on the application of the *Plaumann* test, which Jégo-Quéré could not pass.⁵²

5. *The Rationale of the Court*

The decision to preserve the strict *locus standi* requirements for the so called non-privileged applicants was, non-surprisingly, severely criticized by the legal scholars.⁵³ When delivering its judgements in *UPA* and *Jégo-Quéré*, the ECJ had almost certainly anticipated the intense controversy that would arouse after the verdict.⁵⁴ It is therefore worth analyzing why the Court preferred to follow its traditional view. The arguments for that can be generally grouped into four categories, which will be discussed respectively: the Court’s incompetence to change the meaning of the Treaty, its vision of the European system of remedies, fear of an excessive caseload and the position of the ECJ in the hierarchy of the European courts.

⁴² Case T-177/0, at para. 51.

⁴³ *Ibid.*

⁴⁴ Case T-177/0, at paras. 52-53.

⁴⁵ Case C-263/02 P, at para. 50.

⁴⁶ Case C-263/02 P, at para. 33.

⁴⁷ Case C-263/02 P, at paras. 29-30.

⁴⁸ Case C-263/02 P, at para. 31.

⁴⁹ Case C-263/02 P, at para. 32.

⁵⁰ Case C-263/02 P, at para. 34.

⁵¹ Case C-263/02 P, at para. 38.

⁵² Case C-263/02 P, at paras. 45-46.

⁵³ X. Lewis, ‘Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should It be Fixed?’, 30 *Fordham International Law Journal* 5 (2006-2007), 1514.

⁵⁴ A. Allbors-Lorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 62 *Cambridge Law Journal* 91 (2003), 91.

To start with, the wording of what is now Article 263 TFEU is often claimed to be restrictive in nature.⁵⁵ Those advancing this argument assert that the test adopted in *Plaumann* stems directly from the meaning of the text of the Article in question.⁵⁶ The Court is not allowed to depart from the provision as it would then disregard the intentions of the authors of the Treaty.⁵⁷ Subsequently, it is for the Member States to further an amendment of the Treaty so that individuals are granted wider access to the Court if, of course, they find that necessary.⁵⁸ Additionally, a wider context of *UPA* shall also be taken into account. At the time of deciding the case, the Convention on the Future of Europe was developing what was supposed to be the European Constitution.⁵⁹ It was a perfect opportunity for the Court to merely suggest a need for change, leaving the final policy choice to the Convention.⁶⁰ Some scholars go even further, arguing that the Court refrained from undertaking any significant action because it perceived lack of support among the Member States, which *nota bene* later proved true.⁶¹ Another explanation of the preference for reform through the legislative means may be lack of consensus among the ECJ judges as to how precisely the rules on access to the Court shall be reformulated.⁶²

The Court maintains that the Treaties provide ‘a complete system of legal remedies’, notably based on the combination of Articles 263 and 267 TFEU.⁶³ Hence, the restrictive view on granting individuals a direct access to the ECJ is balanced by relatively more liberal approach concerning indirect actions, through a well-developed set of circumstances where the national courts are obliged to refer cases to the ECJ.⁶⁴ When one is not entitled to seek his rights before the European Court, he shall be able to benefit from the preliminary ruling mechanism in order to challenge the legality of the EU measure.⁶⁵

Furthermore, the relaxation of standing requirement might constitute the so called ‘flood-gate’, i.e. granting every individual a right to initiate an action for annulment against a European decision could lead to massive amount of cases to be dealt with by the Court.⁶⁶ Such situation is highly undesirable as it would negatively influence the

⁵⁵ C. Ginter, ‘Access to Justice in the European Court of Justice in Luxembourg’, 4 *European Journal of Law Reform* 3 (2002), 432.

⁵⁶ *Ibid.*

⁵⁷ J. Martin, ‘At the European Constitutional Crossroads: Easing the Conditions for Standing of Individuals Seeking Judicial Review of Community Acts’, 12 *Michigan State Journal of International Law* 1 (2003), 148.

⁵⁸ B. Jack, ‘Locus Standi and the European Court of Justice: A Faint Light on the Horizon?’, 6 *Environmental Law Review* 4 (2004), 273.

⁵⁹ C. Kombos, ‘The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or a Velvet Revolution?’, 9 *European Integration Online Papers* 17 (2005), 11.

⁶⁰ *Ibid.*

⁶¹ M. Eliantonio, N. Stratieva, ‘From *Plaumann*, through *UPA* and *Jégo-Quéré*, to the Lisbon Treaty: The *Locus Standi* of Private Applicants under Article 230(4) EC through a Political Lens’, 5 *Maastricht Faculty of Law Working Paper* 13 (2009), 9.

⁶² M.-P. Granger, ‘Standing for the Judicial Review of Community Normative Acts: Closing Pandora’s Box?’ 11 *Nottingham Law Journal* 2 (2002), 66.

⁶³ Case 25/62, *Plaumann & Co. v Commission* [1963]; Case 294/83, *Les Verts v European Parliament* [1986].

⁶⁴ L. Heffernan, ‘The Limits of Direct and Indirect Access to the European Community Courts’, 5 *The Law and Practice of International Courts and Tribunals* 2 (2006), 288.

⁶⁵ P. Craig, ‘Legality, Standing and Substantive Review in Community Law’, 14 *Oxford Journal of Legal Studies* 4 (1994), 528.

⁶⁶ C. Ginter, 4 *European Journal of Law Reform* 3 (2002), 434.

efficiency of the Court, rendering already lengthy proceedings even more time-consuming.⁶⁷

Finally, there are a number of indications suggesting that the ECJ perceives itself as an appellate court of the European Union, deciding solely questions of law where the national courts are unable to resolve a matter themselves.⁶⁸ Subsequently, the preliminary ruling procedure under Article 267 TFEU is given preference over the annulment action under Article 263 TFEU.⁶⁹ While in the former it is the national court that investigates the relevant issues of the case and only turns to the Court of Justice in exceptional situations, the latter involves an applicant addressing the ECJ directly and the entire procedure being conducted by the Court. It is affirmed by the fact that the Court in *UPA* ordered the national courts to allow individuals to seek redress against EU acts before them, in accordance with the principle of sincere cooperation as stipulated in Art. 4 (3) TEU.⁷⁰ The ECJ has an apparent interest in such a policy choice – it strengthens its role as a supranational institution and guardian of the legality of the EU measures.⁷¹ Thus, the significance of direct access to the ECJ is outweighed by this strategy.⁷²

6. *Criticism of Maintaining the Status Quo*

Even though some valid explanations for the conservative stance of the ECJ can be provided, it remains undeniable that the current state of law is not entirely justifiable. Numerous arguments serve to prove that a change in the attitude of the Court towards the issue of access of citizens thereto would be much welcomed. This section will focus on the main counter-arguments to the analysis outlined in the previous part, as well as distinct vital reasons for removing the hurdles to individuals' claims for annulment of the EU measures.

The ECJ's reluctance to change the meaning of the Treaty is not an exceptionally convincing argument as the Court happened to depart clearly from the intent of its drafters on numerous occasions in the past.⁷³ Moreover, when it comes to Article 263 TFEU itself, it did not hesitate to award standing to the European Parliament, despite the evident lack of the original intention of the Treaty authors to do so.⁷⁴ Besides that, taking into consideration the current state of affairs in the European Union, it will be much more difficult to drastically amend the Treaty than it would be for a Court to engage in the judicial activism.⁷⁵ That possibility would not be excluded as many experts assert that Art. 263 TFEU does not go any further than to require a proof of individual concern, the exact interpretation of which can be subject to the Court's almost unlimited discretion.⁷⁶

⁶⁷ *Ibid.*

⁶⁸ P. Craig, 'Legality, Standing and Substantive Review in Community Law', 14 *Oxford Journal of Legal Studies* 4 (1994), 521.

⁶⁹ C. Ginter, 4 *European Journal of Law Reform* 3 (2002), 431.

⁷⁰ Case C-50/00 P, at para. 42.

⁷¹ Eliantonio, Stratieva, 5 *Maastricht Faculty of Law Working Paper* 13 (2009), 10.

⁷² C. Kombos, 'A Paradox in the Making: Detecting Something Positive in *UPA* Under *Ten Kate* Effect', 15 *European Law Journal* 4 (2009), 518.

⁷³ A. Allbors-Lorens, 62 *Cambridge Law Journal* 91 (2003), 90.

⁷⁴ D. Nicol, 'Right of Judicial Protection Before the EC Courts', 7 *Journal of Civil Liberties* (2002), 151.

⁷⁵ L. Heffernan, 5 *The Law and Practice of International Courts and Tribunals* 2 (2006), 295.

⁷⁶ P. Craig, C. de Burca, *EU Law: Text, Cases and Materials*, (Oxford University Press, 2008).

Also the reasoning that an applicant shall, when unable to bring a case to the ECJ, rely on the possibility of the preliminary ruling is not the most accurate. Solely a European court is competent to invalidate a European measure.⁷⁷ For that reason, whenever a national court intends to challenge it, reference must be made to the ECJ.⁷⁸ This solution entails that individuals are ‘misdirected to a court which cannot give them a remedy in order to be redirected to a court which can’.⁷⁹ It shall be noted that a possibility exists that the national court declines to make a preliminary reference in the first place, which means that if the applicant still wishes to challenge a measure, he would need to proceed to the higher national court in hope of a reversal of the previous verdict.⁸⁰ That observation leads to a conclusion that the outcome proposed by the Court creates a risk of unreasonable delay to the applicants.⁸¹ Furthermore, it is sometimes impossible for the applicants to seek redress in the national courts, e. g. when there is no national measure on which the claim could be based or when the national procedures do not envisage for a certain type of claim.⁸² In other cases, the applicant would be forced to infringe a legal rule in order to be able to bring his claim.⁸³ The effectiveness of the solution envisaged by the Court is hence entirely dependent on the existence of national procedures, which, according to the principle of national procedural autonomy, go entirely beyond the scope of jurisdiction of the ECJ.⁸⁴ Finally, due to the shorter time limits, an action under Article 263 TFEU is preferred because it assures legal certainty.⁸⁵ The ECJ seems to be of the view that an effective judicial protection does not require a right to access to the least expensive or the fastest procedure.⁸⁶ That attitude does not, perhaps, undermine the concept of effective judicial protection as such but definitely maintains exclusively the minimal level thereof.

Contrary to the popular belief, relaxing the standing for individuals does not automatically imply an unreasonable increase in the ECJ caseload. Despite having the *locus standi*, an applicant still needs to prove the grounds for substantive review under Art. 263 TFEU. Hence, no rational person would engage in initiating the costly proceedings for annulment simply because they are granted standing.⁸⁷ Moreover, according to the data available, the Member States which decided to relax the national rules on the access to the judicial review did not encounter significant problems regarding an excessive number of cases.⁸⁸

One of the most criticized aspects of the European Union is the democratic deficit. That issue, however, is usually debated in the context of indirect election of the

⁷⁷ D. Nicol, 7 *Journal of Civil Liberties* (2002), 149.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ A. Allbors-Lorens, 62 *Cambridge Law Journal* 91 (2003), 82.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ L. W. Gormley, 29 *Fordham International Law Journal* 4 (2006), 681.

⁸⁴ N. Fennelly, ‘The Role of the National Judge in Ensuring Access to Community Justice: Reflections on the Case Law of the Community Courts Four Years on from Jégo-Quéré/UPA’, 7 *ERA-Forum* 4 (2006), 470.

⁸⁵ A. Allbors-Lorens, 62 *Cambridge Law Journal* 91 (2003), 82.

⁸⁶ J. Engstrom, ‘Turning a Deaf Ear to Effective Judicial Protection? The ECJ’s Judgement in C-50/00 P 10 *Unión de Pequeños Agricultores*’, 10 *Tilburg Foreign Law Review* 1 (2003), 388.

⁸⁷ M.-P. Granger, ‘Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*’, 66 *The Modern Law Review* 1 (2003), 134.

⁸⁸ A. Cygan, ‘Protecting the Interests of Civil Society in Community Decision Making – The Limits of Article 230 EC’, 52 *International and Comparative Law Quarterly* 4 (2003), 1001.

legislative and executive bodies of the Union. The problem of legal accountability, despite its great significance for the legitimacy of the EU decisions, did not attract that much public attention. Legal accountability implicates that citizens are granted right to complaint in court about the misuse of power by the decision-makers.⁸⁹ On the national level, such actions are traditionally initiated by interest groups, while on the European level, they are not granted standing.⁹⁰ The prospect of a direct challenge against a Union act would generate a powerful notion that the citizens have a say in the policy making and that the legislative organs of the EU can be held accountable.⁹¹ The strict interpretation of the meaning of individual concern by the ECJ negates a significant tool for improving engagement of the society in the European affairs.⁹² Enabling wide access to the judicial review shall be therefore perceived as an element encouraging public participation.⁹³

7. *The Epilogue - Lisbon Treaty*

Refusing to grant a more liberal *locus standi* to the non-privileged applicants in *Jégo-Quéré & Cie SA v. Commission* and *Unión de Pequeños Agricultores v. Council of the European Union*, the Court of Justice underlined that the only correct manner to introduce such changes would be through an amendment of the Treaty. The Member States decided to undertake that task, which resulted in the new wording of Article 263 (4) TFEU. Since the entry into force of the Lisbon Treaty, it is enough to prove direct concern in order to challenge a regulatory act that does not entail any implementing measures. However, the new distinction is inadequate to resolve the problem of insufficient access to justice.⁹⁴ Due to lack of definitions of legislative act and regulatory act, the precise scope of the provision and its implications are unclear.⁹⁵ Furthermore, the change concerns only the acts not requiring implementation. On one hand, it has a positive aspect in a sense that it grants standing to those who previously had to infringe a legal rule in order to seek remedy.⁹⁶ On the other hand, though, there remains a plethora of situations not covered by the amendment where an effective remedy is still unavailable.⁹⁷ Thus the dilemmas concerning the application of the preliminary reference procedure continue to be unresolved.

8. *Conclusion*

Access of individuals to the European Court of Justice is currently seriously hindered due to the excessively restrictive application of the requirement of individual concern. The preliminary reference procedure, recommended by the Court when *locus standi* is not available, is insufficient, lengthy and costly. At best, it can be a more complicated

⁸⁹ Eliantonio, Stratieva, 5 *Maastricht Faculty of Law Working Paper* 13 (2009), 6.

⁹⁰ *Ibid.*

⁹¹ Eliantonio, Stratieva, 5 *Maastricht Faculty of Law Working Paper* 13 (2009), 7.

⁹² *Ibid.*

⁹³ C. Kombos, 15 *European Law Journal* 4 (2009), 519.

⁹⁴ Eliantonio, Stratieva, 5 *Maastricht Faculty of Law Working Paper* 13 (2009), 7.

⁹⁵ C. Kombos, 9 *European Integration Online Papers* 17 (2005), 16.

⁹⁶ Eliantonio, Stratieva, 5 *Maastricht Faculty of Law Working Paper* 13 (2009), 8.

⁹⁷ *Ibid.*

method to achieve the same purpose as an action for annulment under Article 263 TFEU. Nonetheless, it creates a lacuna in the scope of legal protection granted to individuals. Subsequently, certain citizens are left with no remedy against measures adopted by the European Union. Others need to rely on national remedies and discretion of the local courts to refer a case to the ECJ. It is arguable whether such solution is in line with the principle of effective judicial protection. What is certain, however, is that the policy choice of the ECJ to combine an action for annulment and preliminary ruling procedure in order to create a complete system of remedies is controversial, to say the least.

Introduction of a less strict test would place both the ECJ and the non-privileged applicants in a better position. The Court could finally concentrate on the substance of the proceedings, instead of focusing on the analysis of the purely formal issue of admissibility. At the same time, citizens would be given a significant opportunity to engage in the European affairs, furthering participatory democracy.

The recent amendments adopted in the framework of the Article 263 (4) of the Treaty on Functioning of the European Union leave no doubt that the Member States did not manage to respond to the main allegations against the *locus standi* of individuals in the annulment action as interpreted by the ECJ. Even though the newly adopted provision suggests some change, it remains conservative and vague. Hence, the ball is once again in the ECJ's court.

NATIONAL COURTS - DIRECT EFFECT AND SUPREMACY - THE CONSTITUTIONAL SIGNIFICANCE OF CILFIT

Lena Rossbach

Abstract: This paper analyzes the development of the preliminary ruling procedure and the influence of the notions of *acte claire* and *acte éclairé* established by *CILFIT*. The latter is deemed to have rebutted the process by which the European Union was transformed from a system of international treaties to a system of supra-national governance. Moreover, the powers of national courts are characterized by the terms of gatekeepers and agenda-setters; due to *CILFIT* the relationship between the ECJ and national courts has substantially changed, as the latter's authority has been undermined. Moreover, *CILFIT* decreased the functions of the preliminary reference procedure with regard to the development of law of the European Union, the maintenance of the balance of EU and Member State institutions, the unity of EU law with view to the coherence of judicial remedies, and the administration of justice.

1. Introduction

According to Article 267 of the Treaty on the Functioning of the European Union, the European Court of Justice (ECJ) provides preliminary rulings on the interpretation of the Treaties and the validity and interpretation of acts of institutions, bodies, offices or agencies of the European Union for national courts making such a request. This request is generally not mandatory, so that national courts may decide freely whether to employ the preliminary reference procedure or not.

Still, a case may occur in which the concerned national court is required to make a reference; this specifically entails the situation where no judicial remedy is available under national law. However, the latter case does not necessarily determine an obligation for the national court to refer, as *CILFIT*, a case of 1982, laid down conditions in order to establish the existence of such an obligation. It stated that if the question of law that was to be referred to the ECJ were irrelevant, or in case the doctrine of *acte claire* or *acte éclairé* applies, there is no such obligation on the part of the national court to refer; hence *CILFIT* in that regard transformed the preliminary reference procedure.

This paper analyzes the constitutional transformation of the preliminary reference procedure as it appears due to *CILFIT*. Firstly, it will consider the technical elements of the preliminary reference procedure and of *CILFIT*, examining the content of both legal concepts. Secondly, it shortly provides an impression of the practical impact of *CILFIT*, before it continues to consider in depth the relevance of the preliminary reference procedure. Thereafter, the paper goes on to examine the constitutional significance of *CILFIT* with regard to its transformation of the preliminary reference procedure. Finally, it provides a conclusion, summarizing the main arguments of the constitutional transformation of the preliminary reference procedure.

2. *Content of the Preliminary Reference Procedure*

The process of legal integration, specifically the preliminary ruling procedure, is the outcome of optimizing behaviour of three groups of decision makers. These are the litigants, the national courts and the ECJ. Together they create demand and supply for interpretation of EU law.¹ It is for the litigants to decide to demand a ruling before a national court, the result of which may be a preliminary reference. To decide whether this is the case is left to the national court, which therefore is considered to be the gate-keeper of the preliminary reference procedure.² Finally, the ECJ delivers a preliminary ruling and the national court takes the final decision on implementing it in its judgment. Therefore a causal connection between these parties exists; in the absence of one of the three decision makers the procedure of preliminary reference would be unthinkable.³

The European Court of Justice (ECJ) is in a position to provide preliminary rulings for national courts making such a request. The former comprise answers to questions of law concerning the interpretation of the Treaties and the validity and interpretation of acts of institutions, bodies, offices or agencies of the European Union.⁴

National courts enjoy a ‘monopoly of adjudication’ on cases involving European Union law.⁵ Therefore they may not be deprived of the jurisdiction on disputes, even if these involve the European Union as a party to the proceedings.⁶

However, there are two cases in which national courts do not have jurisdiction. Firstly, where a matter is conferred on the ECJ by the Treaties, the ECJ enjoys exclusive jurisdiction in these legal areas.⁷ The second case, however, occurs when a national court considers an EU measure to be invalid. The principle that national courts may not declare an EU measure invalid arises from the fact that this power is exclusively granted to the ECJ.⁸

Moreover, when a national court exercises its discretion of adjudication on EU law, it is not mandatory but lies within its disposal to request a preliminary ruling of the ECJ.⁹ Still, there is one exception to this; when there is no judicial remedy available under national law, national courts are obliged to make a preliminary reference.¹⁰

Due to these facts, in the case of a national court having jurisdiction while being the court of last instance in the national system, it seems compulsory for the latter to make a reference to the ECJ. However, this has been the applicable legal practice as long as until the year of 1981, when *CILFIT* specified the principles of *acte claire* and *acte*

¹ George Trimidas et al, National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure, 24 International Review of Law and Economics, (2004), 125f.

² Ibid.

³ Ibid.

⁴ Treaty on the Functioning of the European Union (TFEU), Section 267.

⁵ Damien Chalmers, European Union Public Law, (Cambridge, 2010), 150.

⁶ TFEU, s. 274.

⁷ TFEU, s. 274.

⁸ Case 314/85 Firma Foto-Frost v Hauptzollamt Lübeck-Ost (1987) ECR 4199.

⁹ TFEU, s. 267.

¹⁰ TFEU, s. 267.

éclairé. These reverse the concept of an obligation on the national court to request a preliminary reference when there is no judicial remedy available under national law.¹¹

3. *Content of CILFIT*

In *CILFIT*, there was a dispute between a group of wool importers and the Italian Ministry of Health concerning the payment of a fixed health inspection levy for wool imported from outside the European Union. The wool importers relied on Article 2(2) of Regulation 827/68, stating that Member States may not levy a charge on animal products having an effect equivalent to a customs duty. The question raised by the Ministry of Health was whether wool falls under the definition of animal products as defined by EU law.¹²

The Ministry of Health argued that the answer is obvious, as wool is not included in Annex ii of the EEC Treaty, which lists animal products, and that therefore no preliminary reference to the ECJ about this question was required. However, as the matter was dealt with by the Italian Court of Cassation, which is the highest civil court in Italy, there was no further judicial remedy available under national law. Due to this fact, the wool firms stated that under Article 177 of the EEC Treaty¹³ the Italian court was obliged to refer the matter to the ECJ.¹⁴

As there were two conflicting arguments, the Italian Court of Cassation referred to the ECJ a question for a preliminary ruling on whether the obligation of national courts to make a preliminary reference in the case of no judicial remedy under national law is subject to conditions.¹⁵

The case continues to establish the rule that no obligation lies on the national court to refer to the ECJ solely because the litigant deems it necessary; further the court may as well decide to make a preliminary reference on its own.¹⁶

Moreover, it determines that courts are not obliged to refer a question which they do not consider relevant, meaning matters that do not affect the outcome of the case. Though, if the court considers the question as relevant in order to decide the case, it is obliged to refer it under Article 177 of the EEC Treaty.¹⁷

However, there are two alternative routes to that of irrelevance in order to circumvent the obligation to make a preliminary reference, as *CILFIT* established the concepts of *acte claire* and *acte éclairé*. The principle of *acte claire* states that the question is obvious in such a manner not leaving scope for a reasonable doubt as to its application. In this case, the question does not have to be referred to the ECJ, even if the national court would be obliged to do so otherwise.¹⁸

The second manner to avoid the obligation to make a preliminary reference is the presence of an *acte éclairé*. An *acte éclairé* occurs when the question raised is materially

¹¹ TFEU, s. 267, Case 283/81 *CILFIT v Ministry of Health* (1982) ECR 341.

¹² *CILFIT*.

¹³ This article is equivalent to Article 267 TFEU.

¹⁴ *CILFIT*.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

identical with a question which has already been dealt with by the ECJ in a preliminary ruling for a similar case. This principle is not stated in *CILFIT* for the first time, as the court relies on *Da Costa vs. Nederlandse Belastingadministratie*, from which the concept of *acte éclairé* originates.¹⁹

However, in order to establish an *acte claire*, the national court must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. In order to establish that a matter is equally obvious, three criteria must be met.

Therefore it is required that a comparison is made of the different language versions of the provision. Moreover, account must be taken of the terminology of the provision, as “terms and concepts in Community law do not necessarily have the same meaning as the laws of the various member states”. The third and final requirement to be met in order to ensure the existence of an *acte claire* is that the provision is analyzed in the proper legal context, taking into consideration the provision’s purpose and state of development.²⁰

Concluding, *CILFIT* states that a national court to which no judicial remedy is available under national law is obliged to make a preliminary ruling under Article 177 of the EEC Treaty, except it deems the question to be either irrelevant for solving the dispute at hand, or an *acte claire*, or an *acte éclairé*, which must be determined subject to certain requirements.

In order to establish an *acte éclairé* it is necessary that the legal question is materially identical with a question already dealt with by the ECJ in a preliminary ruling applying to a similar case. An *acte claire*, however, it is harder to determine, as its requirements are threefold. Therefore the provision must be compared in all EU language versions, the terminology must be taken into consideration and account has to be taken of the provision’s purpose and state of development.²¹

4. *Practical Impact of CILFIT*

The practical impact of *CILFIT* introducing the notions of *acte claire* and *acte éclairé* was limited; some consider it to be so restricted in scope as to be almost meaningless.²² This view arises due to the fact that the requirements set by *CILFIT* are rather strict. For instance, only few national judges are able to compare the content and legal context of a provision in all languages of the Union, which is one of *CILFIT*’s requirements in order to establish an *acte claire*.²³ A case that had difficulties with interpreting the different language versions and therefore was precluded from declaring an *acte claire* was *Kraaijeveld v Zuid-Holland*.²⁴ Moreover, the principle of *acte éclairé* is as well subject to

¹⁹ *CILFIT*, citing Case 28-30/62 *Da Costa* (1963) ECR 37.

²⁰ *CILFIT*.

²¹ *Ibid.*

²² F. Mancini *et al*, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, 11 Yearbook of European Law 1, (Oxford University Press, 1991), 4.

²³ *CILFIT*.

²⁴ Case 72/95 *Aanemersbedrijf P.K. Kraaijeveld v Gedeputeerde Staten van Zuid-Hoolland* (1996) ECR I-5403.

limitation, as it may only be established if the ECJ has previously delivered a preliminary ruling in a similar case.²⁵

However, *CILFIT*'s significance does not lie in its formal requirements, but rather in its theoretical impact. It enables national courts to decide themselves on matters of EU law which they deem an *acte claire*, an *acte éclairé* or an irrelevant question of law.²⁶ On the one hand, the self-determination of national courts can be seen as a lacuna in judicial proceedings, as a court may refuse individuals access to the preliminary reference procedure and therefore as well to the expertise of the ECJ.²⁷ In contrast to this view, the doctrines of *acte claire* and *acte éclairé* may as well be regarded as eliminating potential conflicts arising between national courts and the ECJ, since the former can avoid criticizing the European legal order, which it would do by making a preliminary reference.²⁸

5. *Relevance of the Preliminary Reference Procedure*

The preliminary reference procedure is described as the most important procedural rule of the Treaty Establishing the European Community.²⁹ Moreover, it is the main procedure to ensure constitutionalization of the EU.³⁰ The relevance of the preliminary reference procedure is characterized by four main issues; these comprise the development of law of the European Union, the maintenance of the balance of EU and Member State institutions, the unity of EU law with view to the coherence of judicial remedies, and the administration of justice.³¹

5.1 Relevance of the Preliminary Reference Procedure - Development of EU law

Firstly, the preliminary reference procedure furthers the development of EU law, as the ECJ can eliminate uncertainties, correct injustices and develop new interpretations of existing EU law.³²

This development may particularly be observed as the preliminary reference procedure is traditionally seen as a keystone to the twin pillars of the doctrines of direct effect and supremacy of the law of the European Union, which were both established by a preliminary ruling; the principle of supremacy of EU law was set up in *Van Gend en Loos* and the concept of direct effect was realized by *Costa v. ENEL*.³³

²⁵ *CILFIT*.

²⁶ *Ibid.*

²⁷ Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, (Longman, 2002), 226.

²⁸ J. Golub, *The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice*, (1996), 376 f.

²⁹ Trimidas, *National Courts and the European Court of Justice*, 127.

³⁰ *Ibid.*

³¹ European Court of Justice, *The Future of the Judicial System of the European Union*, (Luxembourg, 1999), 21.

³² Chalmers, *European Union Public Law*, 157.

³³ Trimidas, *National Courts and the European Court of Justice*, 127f.

However, both doctrines are essential characteristics of the law of the European Union, and therefore point at the significance of the preliminary ruling procedure for establishing new principles of EU law by constitutional review.³⁴

5.2 Relevance of the Preliminary Reference Procedure - Maintaining the Balance of EU and Member State institutions

The second result of the procedure is that it maintains the institutional balance by creating respect for the autonomy between EU institutions and other EU or national institutions. This development entails two elements; the relationship between national courts and the ECJ and the judicial review made by litigants before national courts.

Firstly, it addresses the balance of powers as divided between the national courts and the ECJ. The national courts are seen as the gatekeepers³⁵ and agenda-setters³⁶ for developing EU law. Hence, they are mostly free to determine whether a matter is referred to the ECJ or not³⁷, and if so, which subject the preliminary ruling will concern.³⁸ Secondly, the maintenance of institutional balance is specifically implemented by judicial review initiated by private parties who have the possibility to challenge national and EU authorities' behaviour conflicting with EU law.

Therefore individuals may claim before a national court the incompatibility of national law with EU law. The proceedings before the national court may then require a preliminary reference, so that the concepts of direct effect and supremacy of EU law enable active constitutional review of national law by private parties before national courts.³⁹ This procedure is described as the 'sword', by which litigants may actively review national law. However, there is as well a procedure of the litigant employing EU law as a 'shield'; this will be evaluated in the section below.

5.3. Relevance of the Preliminary Reference Procedure - Unity of EU Law and Coherence of Judicial Remedies

Moreover, the preliminary reference procedure ensures the unity of EU law and coherence of judicial remedies throughout the different Member States of the European Union. The principle of unity of the EU legal order was first supported by the doctrine of supremacy of EU law, which was established by *Costa vs. ENEL* in 1964. However, this development was not sufficient to guarantee a uniform interpretation of EU law in the separate Member States. Still, as EU law was subject to litigation in national courts, the interpretation of one and the same piece of legislation could be of striking difference when comparing the rulings of several national courts.⁴⁰ However, due to the higher

³⁴ Douglas-Scott, *Constitutional Law of the European Union*, 225 f.

³⁵ Ali M. El-Agraa, *The European Union: economics and policies*, (Cambridge University Press, 2007), 72.

³⁶ Trimidas, *National Courts and the European Court of Justice*, 136.

³⁷ For situations of national courts being obliged to make a preliminary reference see section I of this paper.

³⁸ Trimidas, *National Courts and the European Court of Justice*, 136.

³⁹ Trimidas, *National Courts and the European Court of Justice*, 128.

⁴⁰ Douglas-Scott, *Constitutional Law of the European Union*, 225 f.

authority of the ECJ compared to all other EU courts, the principle arises that procedures originating in one Member State involving an ECJ preliminary ruling are as well binding on other Member States.⁴¹ Therefore the preliminary ruling procedure provides the possibility to ensure a unified system of EU law and of judicial remedies which is implemented by the rulings of national courts involving ECJ preliminary rulings and therefore binding all other courts of the European Union.

5. 4. Relevance of the Preliminary Reference Procedure - Administration of Justice

The fourth and final element of the impact of the preliminary reference procedure is the administration of justice. In this procedure, national courts may solve disputes concerning EU law themselves by drawing profits from the expertise of the ECJ. This is a great gain to the litigants before the national courts, since persons who would apart from the preliminary ruling not be entitled to direct access or to appeal to the ECJ still draw profits from the latter's expertise.⁴²

6. *Constitutional transformation of the Preliminary Reference Procedure by CILFIT*

Prior and subsequent to *CILFIT*, national courts were in possession of a 'monopoly of adjudication' on cases involving European Union law, meaning that they may rule on matters that do not lie within the exclusive competence of the ECJ.⁴³ Hence, they ensure the practical application of EU law throughout the Member States, which was not subject to change due to *CILFIT*.⁴⁴

Moreover, national courts have become important participants in the development of the law of the European Union. Firstly, they act as gate-keepers for the preliminary reference procedure, deciding whether a preliminary reference is made or not.⁴⁵ Secondly, the role of agenda-setters is vested in them, as they may determine the subject matter that is contained in the question of law referred to the ECJ.⁴⁶

However, prior to *CILFIT*, there were several limitations to this. Firstly, national courts had to refer a question to the ECJ when they considered that a provision of EU law is invalid.⁴⁷ This obligation applies as well after *CILFIT*, as the latter only concerns the obligation imposed on national courts by the fact that there is no judicial remedy available under national law.⁴⁸

Therefore, national courts were obliged to make a preliminary reference in the case that against the concerned court no judicial remedy is available under national law.⁴⁹ The latter obligation is still fixed in article 267 of the Treaty on the Functioning of the European Union, however it has fundamentally changed due to *CILFIT*.

⁴¹ Trimidas, National Courts and the European Court of Justice, 127.

⁴² Douglas-Scott, Constitutional Law of the European Union, 226.

⁴³ Chalmers, European Union Public Law, 150.

⁴⁴ Case 104/79 Foglia v Novello (1980) ECR 745.

⁴⁵ El-Agraa, The European Union: economics and policies, 72.

⁴⁶ Trimidas, National Courts and the European Court of Justice, 136.

⁴⁷ Firma Foto-Frost v Hauptzollamt Lübeck-Ost.

⁴⁸ *CILFIT*.

⁴⁹ TFEU, s. 234.

CILFIT determined that in the case of an *acte claire* or an *acte éclairé*, which must be determined by the national court subject to conditions, there is no obligation to refer under what is now article 267 TFEU.⁵⁰

Due to the fact that a national court may, subject to conditions, determine the presence of an *acte claire* or an *acte éclairé*, the power is vested in it to prevent the positive impact of the preliminary reference procedure.

The first function it may therefore preclude is the development of EU law, by not making a preliminary reference. However, this element breaks down to three elements, as the ECJ can eliminate uncertainties, correct injustices and develop new interpretations of existing EU law.⁵¹

If therefore a national court employs its discretion originating from *CILFIT* as to not refer a question of law to the ECJ, it precludes the development of EU law with view to the latter remaining partly uncertain, unjust, and not sufficiently interpreted.

Moreover, another function of the preliminary reference procedure is to maintain the balance of EU and Member State institutions. This capacity, as well, is invalidated by the national courts' discretion obtained as a result of *CILFIT*. Hence, the authority vested in the ECJ is undermined, as the national court may prevent the occurrence of a preliminary reference procedure, which became the central source of jurisdiction of the ECJ.⁵² Due to this fact, subsequently to *CILFIT*, the European Court of Justice seems to be in a weaker position than a supreme court in a federation.⁵³

The second element comprised in the function of maintaining the balance of EU and Member State institutions is the ability of private parties to challenge decisions of national governments and EU institutions. By the freedom of decision entailed in *CILFIT*, national courts may refuse to grant litigants the opportunity to control the acts of institutions both on national and EU level. The impact of this is obvious; litigants not having direct access to the European Court of Justice are deprived of their ability to undertake a judicial review of EU law. As a result, there is one element less in the chain of checks and balances, which is a fundamental element of democracy among the Member States and within the EU.⁵⁴

Moreover, the preliminary reference procedure is employed in order to unify the law and the judicial remedies available in the European Union. On this part, the preliminary reference procedure may itself deliver a ground for national courts competing against the dilution not to make a reference caused by *CILFIT*; the binding effect of a judgment.

As a ruling of a national court including a preliminary ruling of the ECJ becomes binding throughout the EU, each national court has an interest in delivering a judgment including a preliminary reference. Hence there exists a strong reason to disregard the freedom granted by *CILFIT* and make a preliminary reference regardless of the absence of an obligation to do so.⁵⁵

However, if the national court, due to the discretion granted to it by *CILFIT*, decides against referring a question to the ECJ, there is one final function of the

⁵⁰ *CILFIT*.

⁵¹ Chalmers, European Union Public Law, 157.

⁵² El-Agraa, The European Union: economics and policies, 72.

⁵³ Trimidas, National Courts and the European Court of Justice, 127.

⁵⁴ Douglas-Scott, Constitutional Law of the European Union, 226.

⁵⁵ Trimidas, National Courts and the European Court of Justice, 134.

preliminary ruling procedure which is disregarded. This is the possibility of litigants and national courts to receive the expertise of the European Court of Justice. Therefore litigants who do not have access to the ECJ will not come into the indulgence of being recipients of a statement of law made by the latter when the national court before which the case is filed refuses to make a preliminary reference.⁵⁶

Further, the same applies to national courts; together with the possibility to establish binding effects of the judgment, the benefit of receiving the expertise of the ECJ are presumed strong arguments to waive the freedom granted by CILFIT and to make a preliminary reference even though there is no longer an obligation to do so.⁵⁷

Finally, due to the theory of supra-nationalism, the impact of the *CILFIT* notions can be characterized as rebutting the development of the European Union from a system of intergovernmental treaties to a supranational system. This occurs by reallocating the powers of the ECJ derived from the surrender of sovereignty by the Member States to the national courts, which results in leaving the ECJ, representing the function of an EU institution, less powerful than prior to *CILFIT*.⁵⁸

7. Conclusion

Article 267 of the TFEU stipulates that the ECJ provides preliminary rulings in order to answer questions of law on the interpretation of the Treaties and the validity and interpretation of acts of institutions, bodies, offices or agencies of the European Union, if this is requested by a national court. National courts are not obliged to request a preliminary ruling, unless there is no judicial remedy available under national law.

This stipulation is overturned by *CILFIT*, which determines that the obligation may be as well be rebutted by a decision of the national court that the matter is either irrelevant to the dispute, or an *acte claire*, or an *acte éclairé*.

However, the conditions as to determine the existence of the latter are rather strict, so that the practical impact of *CILFIT* is limited. Nevertheless its theoretical character produces a constitutional transformation of the following elements of the preliminary reference procedure.

Firstly, the development of EU law is prejudiced by national courts, which are allocated greater freedom in their decision not to make a preliminary reference by *CILFIT*. Due to this fact, the law of the European Union may remain partly uncertain, unjust, and not sufficiently interpreted.

Secondly, the maintenance of the balance of EU and Member State institutions is endangered by CILFIT, as the authority of the ECJ is undermined by national courts and the European Union is deprived of the opportunity of judicial review by private litigants before national courts.

However, the third function of the preliminary reference procedure being the unity of EU law and the coherence of judicial remedies may reduce the national court's interest to employ the *CILFIT* notions of *acte claire* and *acte éclairé*, due to the fact that

⁵⁶ Douglas-Scott, Constitutional Law of the European Union, 226.

⁵⁷ Trimidas, National Courts and the European Court of Justice, 134.

⁵⁸ Trimidas, National Courts and the European Court of Justice, 125f.

they might prefer to imply binding effects of their judgments on all other courts of the EU.

The fourth function of the preliminary reference infringed by the principles laid down in *CILFIT* is that of administration of justice, meaning that private parties involved in proceedings before the national court are deprived of the ECJ's expertise they would generally receive during the preliminary reference procedure.

Finally, the impact of the *CILFIT* notions can be described as rebutting the development of the European Union from a system of intergovernmental treaties to a supranational system. This occurs as the powers of the ECJ derived from the surrender of sovereignty by the Member States are reallocated to the national courts, which results in leaving the ECJ, representing the function of an EU institution, less powerful than prior to *CILFIT*.

THE HORIZONTAL EFFECT OF DIRECTIVES AFTER *KÜCÜKDEVECİ*

Fiona Skevi

Abstract: In the *Küçükdeveci* judgment, the European Court of Justice declared that general principles of EU law have horizontal direct effect and that national provisions which are contrary to those general principles must be disapplied. The aim of this paper is to explore the horizontal and vertical direct effect of directives with regard to the general principles of EU law. Moreover, arguments whether horizontal direct effect must be given to the directives are also given. Additionally, a comparison of previous findings of the Court in *Mangold* and *Marshall* shall be put in critical light in respect of *Küçükdeveci*. The author comes to the conclusion that although horizontal effect of directives would be the best solution, the Court is not to accept such a position for political rather than legal reasons. The final conclusion with respect to the *Küçükdeveci* judgment is that it produces yet another way of protecting individuals for the lack of horizontal direct effect.

1. Introduction

By its judgment of 19 January 2010, the European Court of Justice (hereinafter: the Court) brought about not simply a preliminary ruling on the case of *Seda Küçükdeveci v Swedex GmbH & Co. KG*,¹ but what has been characterized as a revolutionary decision in regard to the direct effect of directives.² Ever since its judgment in *Marshall*,³ the Court has persisted in its opinion that directives may have vertical direct effect, but not horizontal one. Nevertheless, in subsequent case-law, it has developed means to supersede this lack: broadening the notion of ‘state’, introducing and expanding the concept of indirect effect, incidental direct effect, state liability, and very recently, the notion of protection under fundamental principles of EU law.⁴ The Court has been heavily criticized for this since the very beginning, by academic scholars and judges within the Court alike. Yet, it persists on stating that horizontal direct effect does not exist for directives.

In *Küçükdeveci*, the Court went on to state once again that horizontal direct effect does not apply to directives, i.e. an individual cannot invoke or enforce any provision of any directive *vis-à-vis* other individuals. However, the general principle of EU law, which was found in the directive’s provision, gave expression to that fundamental principle.

¹ Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH. & Co. KG*. [2010] (not yet reported).

² In this respect, see: Albertina Albors-Llorens, ‘Keeping Up Appearances: The Court of Justice and the Effects of EU Directives’, 69 *The Cambridge Law Journal* (2010) 3, p. 455.

³ Case 152/84, *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

⁴ It should be noted that the focus of this paper is horizontal direct effect exclusively. For more information on the afore-mentioned concepts see: Damian Chalmers, *European Union Public Law* (Cambridge, 2010); John Fairhurst, *Law of the European Union*, (Longman, 2010); Paul Craig, Gráinne de Búrca, *EU Law : Text, Cases and Materials*, (Oxford University Press, 2008).

With this innovative way, the Court brought about yet again another way of providing individuals protection and compensating for the lack of horizontal effect.

The focus of this paper shall be to provide the reader primarily with all the general information on direct effect of directives; this shall be conducted through the analysis of the relevant case law and their impact on the current situation of direct effect of directives. Subsequently, an analysis of the *Küçükdeveci* judgment will follow and its impact on any future case-law the Court will develop. Finally, it shall be examined and determined whether a horizontal effect does and should exist at all with regard to directives.

2. Directives and the Controversy of Horizontal Direct Effect

2.1 Direct Effect and Horizontal Direct Effect

Once direct effect of Treaty provisions was established,⁵ the question arose whether secondary legislation could produce the same effect. Much controversy followed, with scholars debating for and against it. The debate ended soon afterwards, with the *Van Duyn*⁶ judgment, where the Court of Justice established that directives have direct effect. The Court stated that:

*“It would be incompatible with the binding effect attributed to a directive by Article [288 TFEU] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the usual effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.[...]”*⁷

The judgment led to a renewed controversy on the topic. It was argued that the Court’s reasoning was weak.⁸ Accordingly, the Court introduced the ‘estoppel principle’ in *Ratti* in order to better justify its previous ruling.⁹ It thereby stated that when an individual brings an action against a Member State claiming a right conferred in the directive, the Member State is estopped from using as a defence its failure to implement the directive properly.¹⁰ This meant, in essence, that once the implementation period of a directive has passed, and the state has not implemented the directive, any individual may seek to enforce the said directive against the state.

⁵ Case 26/62, *N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1.

⁶ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.

⁷ *Van Duyn*, para. 12.

⁸ Damian Chalmers, *European Union Public Law*, (Cambridge, 2010), p. 287.

⁹ Case 148/78 *Ministero Pubbico v Ratti* [1979] ECR 1629.

¹⁰ For more information on the estoppel principle see: Craig, de Búrca, *EU Law: Text, Cases and Materials*, pp. 280-1; Sacha Prechal, *Directives in European Community Law: A Study on EC Directives and their Enforcement by National Courts* (Brouwer Uithof, 1995), pp. 251-5; Chalmers, *European Union Public Law*, pp.287-8.

Nevertheless, *Ratti* still did not answer the question of whether directives could be enforced against individuals. The judgment certainly did give a justification for direct effect and it seemed to imply the existence of *vertical* direct effect, but not horizontal.¹¹ This assumption was confirmed in *Marshall*,¹² one of the leading and most important cases in regards to direct effect of directives.

2.2 Marshall: No Horizontal Direct Effect

Marshall concerned a 62-year-old woman who was dismissed by her employer, a British health authority, because she had passed the retirement age, which was 60 years at that time for women and 65 years for men. National legislation did not impose an obligation to retire at that age, but it did not prohibit discrimination on grounds of sex either. Marshall claimed that there was a breach of the Equal Treatment Directive,¹³ article 5 in particular, which calls for equal treatment of men and women with regard to working conditions, including the conditions governing dismissal. The Court ruled that '[...] a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person.'¹⁴

The impact that *Marshall* had on future case-law was considerable. It did not stop the debate regarding horizontal direct effect, but it did establish firmly the Court's position in regard to it. In subsequent case-law the Court re-affirmed again and again this position.¹⁵ Gradually, this led to the creation of alternative means of protecting individuals and filling in the gaps that this standpoint left.

Marshall has been heavily criticized by scholars¹⁶ and Advocates-General.¹⁷ It has been said that the Court deviated from its normal *effet utile* approach to interpretation.¹⁸ The reasons for this seem to be political rather than legal.¹⁹ First of all, great criticism against the Court was brought by the *Van Gend en Loos* judgment,²⁰ where the direct effect of Treaty provisions was established for the first time. None of the Supreme Courts of the Member State were willing to submit to the Court's power. Had horizontal effect of the directives been established, the uprising of the national supreme courts would have been unbeneficial for the Court, which, after all, required their cooperation for the well-functioning of EU law.

¹¹ Chalmers, *European Union Public Law*, p. 286.

¹² *Marshall v Southampton and SW Hampshire Area Health Authority* [1986] ECR 723.

¹³ Directive 76/207 [1976], O.J. L39.

¹⁴ *Marshall*, para. 48.

¹⁵ See, inter alia, Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325; Case C-192/94 *El Corte Inglés SA v Cristina Blázquez Rivero* [1996] ECR I-1281; Joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer et al. v Deutsches Rotes Kreuz* [2004] ECR I-8835.

¹⁶ Prechal, *Directives in European Community Law*; Jason Coppel, 'Rights, Duties and the End of Marshall' 57 *The Modern Law Review* (1994), 6.

¹⁷ See Opinion of Advocate-General Van Gerven in Case 271/91, *Marshall v Southampton and South-West Hampshire AHA* [1993] ECR I-4367; Opinion of Advocate General Jacobs in Case 316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763; Opinion of Advocate General Lenz in Case 91/92 *Faccini Dori v Recreb* [1994] ECR I-3325.

¹⁸ Prechal, *Directives in European Community Law*, p. 300.

¹⁹ Derrick Wyatt, Alan Dashwood, *European Community Law*, (Sweet & Maxwell, 1993), p. 74.

²⁰ Case 26/62, *N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR I.

Secondly, the non-application of horizontal effect made a distinction between employees on the private sector and the public sector.²¹ If only individuals working for the state could rely on rights conferred in the directives, then clearly employees on the private sector were proportionally disadvantaged. The question could also arise for individuals who were partially employed by the state and partially employed by a private institution.

These questions gave rise to the re-opening of the ‘for-and-against-horizontal-effect’ argument. By its *Marshall* judgment, the Court stated that:

*“With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article [288 TFEU] the binding nature of a Directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to “each Member State to which it is addressed”. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against a person.”*²²

This argument has been characterized as ‘textual’.²³ Nevertheless, it is not as convincing or as decisive as the Court would have liked it to be. Firstly, it has been attacked on the basis of previous case-law: many have suggested that none of the previous ground-breaking judgments of the Court were solely based on textual requirements; on the contrary, the Court would very liberally interpret other Treaty provisions by which, for example, EU law supremacy and direct effect were established.²⁴ Furthermore, while the wording of Article 288 TFEU indicates that directives can impose obligations on Member States (but not on individuals) it does not state whether any obligations are being imposed to private individuals. Advocate General Jacobs has in particular stated that this argument is neither convincing nor decisive.²⁵ He claims that ‘Article 288 TFEU does not directly exclude the possibility of derived obligations arising for persons other than Member States’.²⁶

A second argument put forward against horizontal effect is the distinction between directives and regulations. It has been stated that by the wording of Article 288 TFEU, only regulations can be directly applicable and can, therefore, impose obligations to individuals. If horizontal effect was to be accepted, it would erode the distinction between these two. However, firstly it must be noted that the Court has already dismissed this argument in *Van Duyn*.²⁷ Secondly, the main difference between directives and regulations is that with the former the Member States may choose the form and method of implementation into national law whereas that is impossible with regard to regulations. Granting directives horizontal effect would not erode the distinction, for the Member States would still be capable of choosing the desired form and method of implementation.

²¹ Craig, De Búrca, EU Law: Text, Cases and Materials, p. 284.

²² Marshall, para. 48.

²³ Craig, De Búrca, EU Law: Text, Cases and Materials, p. 283; Sacha Prechal, Directives in European Community Law, p. 295.

²⁴ Coppel, ‘Rights, Duties and the End of Marshall’ 57 The Modern Law Review (1994) 6, pp. 863 – 4.

²⁵ Opinion of Advocate-General Jacobs in Case 316/93, *Vaneetveld v Le Foyer*, [1994] ECR I-00763, para. 20.

²⁶ Ibid.

²⁷ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.

A third argument which has been posed against horizontal effect is with regard to legal certainty.²⁸ It has been claimed that granting directives horizontal effect would lead to legal uncertainty. In general, individuals must be capable of relying on national law. If horizontal effect was to be established, individuals wishing to invoke their rights would face a conflict between requirements set in the national legislation and those deviating from the directives. Thus, individuals would need to examine both national and EU law. This would be too heavy an obligation for individuals. The counter-argument is that this scrutiny can also be said to have been imposed in such situations with regard to national law and regulations.

While all the arguments do not seem very convincing, the Court has insisted on stating the inexistence of horizontal effect of directives. To compensate for this, it has created several other means to fill in the gap which its decisions have created. This led to the broadening of the concept of state in *Foster*,²⁹ incurring state liability in *Francovich*,³⁰ and establishing indirect effect in *Marleasing*.³¹

2.3. Mangold: Horizontal Direct Effect of General Principles of EU Law

The Court managed to keep academia surprised and pondering on how much further could it go in order to cover the lack of horizontal effect. After having created other means, another surprising judgment came with *Mangold*.³² So far the Court, although it had given various judgments on sex equality with regard to working conditions, had not spoken of fundamental principles of EU having direct effect, and horizontal nonetheless.

The case in question concerned the proceedings between two individuals: Mr. Mangold, a senior employee and his employer, Mr. Helm. The two wished to conclude a fixed-term contract, which they did in 2003, when Mr. Mangold was 56 years old. The latter subsequently challenged the fixed nature of the contract on grounds of incompatibility with the 'Framework Agreement'³³ and Directive 2000/78/EC.³⁴ The latter, which also included a prohibition of age discrimination, had not yet been implemented and was due to be transported in December 2003. However, the Member States were capable of extending the implementation period up to December 2006 and Germany, where the dispute sprang forth, had asked for this extension period. The German legislation provided that fixed-term contracts did not require justification if the employee was, at the time of the conclusion of the contract, 52 years old.

The Court noted that the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination on any of the grounds referred to in Article 1,³⁵ which include, *inter alia*, age, with regard to employment and occupation. It then went on

²⁸ For more information on legal certainty with regard to horizontal effect see: Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions', 34 *European Law Review* (2009) 349.

²⁹ Case C-188/89, *Foster v British Gas* [1990] ECR I-3313.

³⁰ Cases C-6 & 9/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

³¹ Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

³² Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

³³ Framework Agreement on fixed term contracts (1999), put into effect by Directive 99/70, [1999] O.J. L 175/43.

³⁴ Directive 00/78, [2000] O.J. L 303.

³⁵ Article 1 of Directive 2000/78/EC states: 'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

to say that the German legislation, by permitting employers to conclude without restrictions fixed-term contracts of employment with workers over the age of 52 introduces a difference of treatment on the grounds of age.³⁶

The Court was also concerned with the fact that the implementation period had not yet ended for the Member State. In particular, Germany had requested for an extension of the transposition period, which she was granted. The Court firstly found that Directive 2000/78 did not in itself lay down the principle of equal treatment with regard to employment and occupation, but the sole purpose of the directive was to 'lay down a general framework for combating discrimination on the grounds of [...] age [...]'.³⁷ It then went on by stating that 'The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'.³⁸

With this judgment the Court established firstly, that the general principle of non-discrimination is a fundamental principle of EU Law; secondly, that the principle of non-discrimination was not established by the Directive itself, but the source of the principle could, in fact, be found in various international instruments and in the constitutional traditions of the Member States. In other words, fundamental principles are capable of producing horizontal effect.

According to the general rules on directives, the Court has stipulated in its case-law that private individuals may rely on a provision of a directive if: firstly, the directive has not been implemented by the Member State on time; secondly, the Member State has not wrongly or belatedly implemented the directive; thirdly, the provision invoked is clear as to the right being invoked. What is striking about *Mangold* is that the implementation period had not yet ended for Germany.³⁹

This statement drew criticism from a large number of academics, who believed this to be yet 'another incoherent piece to its jigsaw on horizontal effect of directives'.⁴⁰ A lot of attention was drawn on the fact that the implementation period for the directive had not yet ended. In this respect, the Court claimed that the individual may not rely on the directive itself, but on the principle of non-discrimination which was expressed through the provisions of the directive.⁴¹ Objections were raised as to this point. First of all, the Court yet again decided to ignore the possibility of applying horizontal effect, but rather chose to stick to its previous case-law.⁴² It could even be said that the Court has completely given up on the idea of horizontal direct effect of directives.⁴³

Secondly, issues were also raised with regard to the general principles and their horizontal effect. On the one hand, it has been argued that the attribution of horizontal effect was not an innovative conclusion, as it has already been established by the Court

³⁶ *Mangold*, para. 56 - 57.

³⁷ *Mangold*, para. 56.

³⁸ *Mangold*, para. 57.

³⁹ *Mangold*, para. 28.

⁴⁰ Sacha Prechal, 'Enforcement of EC Labour Law: Some Less Felicitous Consequences?' in Frans Pennins *et al.*, *Social responsibility in labour relations: European and Comparative perspectives*, (Kluwer Law International, 2008) p. 18.

⁴¹ *Mangold*, para. 70.

⁴² Editorial Comments, 'Horizontal direct effect – A law of diminishing coherence?' in 43 *Common Market Law Review* (2006), 1, 7; Marlene Schmidt, 'The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* judgment' in 7 *German Law Journal* (2005) 505, p. 519; Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions', 34 *European Law Review* (2009) 349.

⁴³ *Ibid.*

that other principles do have direct effect.⁴⁴ In *Defrenne II* the Court established the principle of equal pay for men and women as one of the general principles of EU law.⁴⁵ It should therefore come as a natural consequence that at one point more general principles which produce horizontal effect would emerge. On the other hand, with particular regard to the *Mangold* case, it has also been argued that this was a leading case, as it founded the horizontal effect.⁴⁶ However, nowhere does the Court mention that general principles have ‘real’ horizontal effect; it merely stated that the general principle can be relied upon before national courts when there is a conflict between the principle and the national legislation.⁴⁷ Nevertheless, if it is assumed that the *Mangold* test only applies in cases of age discrimination, its application is too narrow and thus, it would remain as an exception to the rule.⁴⁸ All this remained however speculation rather than an affirmed opinion, up until *Küçükdeveci*.

3. Küçükdeveci: A New Legal Order?

3.1 The Facts and the Court’s Judgment

The amount of criticism the Court was given for *Mangold* led to its silence on the topic for some years. Several cases passed by since then, all of them being on the grounds of age discrimination without the Court referring to the most controversial paragraphs of *Mangold*. Thus, many thought that *Mangold* was nothing but the exception to the rule. It came therefore as a surprise when *Küçükdeveci* was decided upon.

Mrs. Küçükdeveci was an employee of Sweedex since the age of 18. She was dismissed at the age of 25, after having worked for her employer for more than 10 years. The provision in the German Civil Code provided that, notice of period of dismissal ought to be given four months in advance for employees who have worked for more than ten years.⁴⁹ However, the period prior to the completion of the employee’s 25th year was

⁴⁴ Jan H. Jans, ‘The effect in national legal systems of the prohibition of discrimination on grounds of age as a general principle of Community law’, in 3 *Legal Issues of Economic Intergration* (2007) 53, p. 60; C. Tobler, ‘Putting *Mangold* in perspective: in response to *Editorial comments*, Horizontal direct effect- A law of diminishing coherence?’ in 44 *Common Law Review* (2007) 1177, p. 1182.

⁴⁵ Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

⁴⁶ Tobler, ‘Putting *Mangold* in perspective: in response to *Editorial comments*, Horizontal direct effect- A law of diminishing coherence?’ in 44 *Common Law Review* (2007) 1177, p. 1183.

⁴⁷ Jan H. Jans, ‘The effect in national legal systems of the prohibition of discrimination on grounds of age as a general principle of Community law’, in 3 *Legal Issues of Economic Intergration* (2007) 53, p. 60.

⁴⁸ Tobler, ‘Putting *Mangold* in perspective: in response to *Editorial comments*, Horizontal direct effect- A law of diminishing coherence?’ in 44 *Common Law Review* (2007) 1177, p. 1186.

⁴⁹ Paragraph 622 of the German Civil Code (*Bürgerliches Gesetzbuch*, ‘the BGB’) provides:

‘(1) Notice may be given to terminate the employment relationship of an employee with a notice period of four weeks to the 15th or to the end of a calendar month.

(2) For termination by the employer, the notice period, if the employment relationship in the business or undertaking

1. has lasted for two years, is one month to the end of a calendar month,
2. has lasted five years, is two months to the end of a calendar month,
3. has lasted eight years, is three months to the end of a calendar month,
4. has lasted 10 years, is four months to the end of a calendar month,
5. has lasted 12 years, is five months to the end of a calendar month,
6. has lasted 15 years, is six months to the end of a calendar month,
7. has lasted 20 years, is seven months to the end of a calendar month.

not to be taken into account. In accordance with the provision, Mrs. Küçükdeveci's dismissal was notified one month in advance and thus, her working period had been calculated as having been three years. She initiated proceedings against her former employer for discrimination on grounds of age contrary to EU law.

The Court of Appeal (*Landerarbeitsgericht*), noting that the transportation date of the directive had ended and the fact that the national provision could not have been interpreted in such a manner that is compatible with the Directive, referred a preliminary ruling to the Court, thereby asking two questions: Firstly, whether national legislation such as that at issue in the main proceedings constitute a difference of treatment on grounds of age prohibited by European Union law, in particular primary law or Directive 2000/78; secondly, whether the court, in order to disapply a national provision which it considers to be contrary to European Union law, must first make a reference to the Court so that it can confirm that the legislation is incompatible with European Union law.

The Court first considered the first question. First of all, it referred to *Mangold*, by stating that Directive 2000/78, which was adopted by the Council on the basis of Article 19 TFEU (former Article 13 EC), had as a sole purpose 'of laying down a general framework for combating discrimination on various grounds including age',⁵⁰ and that, Directive 2000/78 merely gives expression to the general principle of non-discrimination on grounds of age.⁵¹ In this regard, it also examined Article 21(1) of the Charter of Fundamental Rights of the European Union, which provides that '[a]ny discrimination based on [...] age [...] shall be prohibited'. It concluded that the principle of non-discrimination on grounds of age, as it is given expression in Directive 2000/78, must be the basis of examination of the case in hand. With this regard, it then examined the situation. The Court found that Paragraph 622(2) BGB afforded a difference of treatment on grounds of age in respect to employees with the same length of service depending on the age at which they became employed.⁵² It also found that, pursuant to the national legislation, older employees are at an advantage in comparison to younger employees. Thus, the Court reached the conclusion that EU law must be interpreted as precluding national legislation; therefore, the periods of employment prior to the age of 25 must not be calculated in the notice period for dismissal.⁵³

It ought to be noted that, in respect to the first part of the Court's answer, the Court did not agree with the General Advocate Bot's opinion, who urged the Court to recognize horizontal effect:

*"The Court should therefore, as it has done in regard to the general principle of Community law itself, accept that a directive intended to counteract discrimination may be relied on in proceedings between private parties in order to set aside the application of national rules which are contrary to that directive."*⁵⁴

In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account.'

⁵⁰ *Küçükdeveci*, para. 20; *Mangold*, para. 74.

⁵¹ *Küçükdeveci*, para. 21; *Mangold*, para. 75.

⁵² *Küçükdeveci*, para. 29.

⁵³ *Küçükdeveci*, para. 43.

⁵⁴ Opinion of Advocate-General Bot in Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH. & Co. KG* (not yet reported), para. 70.

In relation to the second question, the Court reaffirmed its infamous position on vertical direct effect of directives, referring to the *Marshall* judgment: no individual may rely on a directive against another individual, as the directives do not impose any obligations on them. It then went on to reassert that Member States are obligated to take all appropriate measures to fulfill their obligations under the directive. The courts, in particular, must interpret national law as far as possible, in the light of the wording and the purpose of the directive in question. The Court made clear that it is the duty of the national courts, when hearing a dispute relating to the principle of non-discrimination on the grounds of age, to grant individuals the legal protection which is to be derived from EU law and to ensure the full effectiveness of that law, even disapplying contrary national law, when applicable.⁵⁵ Nevertheless, the national courts, when faced with the dilemma of bringing a preliminary ruling before the Court, are not obliged, but entitled to ask the Court for a ruling on the interpretation of the principle of non-discrimination, before disapplying any contrary national provision.⁵⁶

3.2 General Principles of EU Law: Direct Effect?

As with *Mangold*, the Court in *Küçükdeveci* relied on a general principle of EU law in order to protect an individual's rights. In both cases, relying on Directive 2000/78 would have been an equally good solution. Instead, and against the opinion of General-Advocate Bot,⁵⁷ who recommended finally granting horizontal effect to directives, the Court followed its previous judgments and stated that directives cannot impose obligations on individuals, and thus cannot be relied upon in the national courts.

What is striking about the judgments is the granting of horizontal effect to general principles of EU law, and the principle of non-discrimination in particular. The Court did not give any reasons for this, nor did it examine the nature of the principles, that is, it did not provide with any explanation as to how or when do these principles have horizontal effect.⁵⁸ This made many ponder as to whether fundamental principles can have horizontal effect to begin with.

The Court stated both in *Mangold* and in *Küçükdeveci* that Directive 2000/78, or any other directive which may be applicable in other cases, does not in itself produce horizontal effect, but that it merely 'gives expression to, but does not lay down' a general principle of EU law, in the afore-mentioned cases, the principle of non-discrimination. If that is the case, then a closer look at the characteristics of the general principles must be given. General principles can protect individuals against public authorities. They can also be defined as being abstract, as they are not concrete rules of law. Furthermore, they are unwritten and unpublished. These facts lead to the conclusion that general principles do not produce direct effect.⁵⁹

⁵⁵ *Küçükdeveci*, para. 47 – 51.

⁵⁶ *Küçükdeveci*, para. 55.

⁵⁷ Opinion of Advocate-General Bot in Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH. & Co. KG* (not yet reported), para. 70.

⁵⁸ Editorial Comments, 'Horizontal direct effect – A law of diminishing coherence?', 43 *Common Market Law Review* (2006), 1, p. 8; Mirjam de Mol, 'Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', 6 *European Constitutional Law Review* (2010) 293, p. 301.

⁵⁹ Mirjam de Mol, 'Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', 6 *European Constitutional Law Review* (2010) 293, p. 301.

Furthermore, it has also argued that general principles cannot have horizontal effect, because they do not impose obligations on individuals.⁶⁰ If the Court-made general rule is applicable, then the general principle in question should be ‘sufficiently clear, precise and unconditional’ in order to impose an obligation on an individual. However, it is difficult to discern how this could be the case.⁶¹ Nevertheless, even if the principle does fulfill the criteria, it would be difficult for the individual, not only to discern which principle must be applied, but also which provisions of the directive would be capable of producing direct effect according to the Court.⁶²

Moreover, the Court’s reasoning could be characterized as weak. The Directive’s preamble through which the general principle is ‘given expression’ states that equality and protection against discrimination are universal rights recognized in various international instruments. This is indeed in accordance with the Court’s reasoning that prohibition of discrimination is a general principle. Nevertheless, a closer look at the international instruments cited shows that none of them prohibit discrimination with respect to age.⁶³ Notwithstanding those facts, and if assuming that non-discrimination with regard to age is also a fundamental right, and thus, a general principle of EU law, derived from the general prohibition on discrimination, the Court was correct in assessing this as a general principle of EU law. However, this does not justify why it produces direct effect. Taking into account that other general principles have been recognized by the Court as having the same effect, then this is a natural consequence. It seems that the Court could not find a better ground to produce this effect.

All in all, although the Court’s reasoning does not sound very convincing, the *Küçükdeveci* judgment certainly did bring about a new legal order. The variety of general principles upon which an individual may rely in horizontal situations implies that the lack of horizontal effect of directives is largely covered. Despite this, many questions are left unanswered with regard to directives and the correct applicability of the horizontal effect, which the Court will have to deal with in future cases. In the end, it does not matter whether the Court has reasoned well; horizontal effect for directives is here to stay.

4. Conclusion

Ever since the Court’s ruling in *Marshall*, Advocates-General and academics alike have tried not only to present a general explanation for why horizontal direct effect should be attributed to directives, but also urge the Court to do so. Despite the critique, the Court has persisted with its initial ruling that due to their very nature, directives do not produce horizontal effect. This led to the Court presenting new ways of circumventing for this lack.

The most recent and remarkable development in this respect is the Court’s judgment in *Küçükdeveci*, where horizontal effect was given to general principles of EU

⁶⁰ Paul Craig, ‘The Legal Effect of Directives: Policy, Rules and Exceptions’, 34 *European Law Review* (2009) 349, p. 375.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Universal Declaration of Human Rights, United Nations Convention of the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

law. The Court's reasoning was found to be weak and lacking in many aspects. This, however, does not change the impact it will have, or the fact that many will persist on discussing or even on demanding the granting of horizontal effect at directives.

From a legal perspective, the no-horizontal-effect-of-directives point which the Court has held since *Marshall* is not as justifiable as the Court would have liked it to be. For the past decades it has created so many means of bypassing horizontal effect which leaves a very small room for a sudden change of heart. After all, this almost stubborn persistence implies that the reasons for this position are political rather than legal: it is very likely that the Court is trying to avoid further tension with the national courts rather than deny individuals their legal rights. After all, their rights and duties are being protected, albeit not as well as they would have been by vertical direct effect.

All in all, it all begins and ends with *Marshall*. The mere fact that the Court has stubbornly affirmed again and again that horizontal effect cannot be established for directives seems to be the ultimate position. *Küçükdeveci* and *Mangold* are just another way for the court to reaffirm its position and the give further protection to individuals.

THE COREPER AND TRANSPARENCY – FROM GOVERNMENT BY MOONLIGHT TO GOVERNMENT BY DAYLIGHT?

Hanneke Piters

Abstract: Currently, the decision-making within the Committee of Permanent Representatives of the governments of the Member States (Coreper) is far from transparent. Therefore, Coreper is also called a government by ‘moonlight’.¹ This article examines to what extent a higher level of transparency in decision-making within the Coreper is desirable. Members of the Coreper have to act within a legal framework in which they can expose their powers. This article will assess whether a higher level of transparency is possible and desirable within the provided legal framework. This will be done through applying a rational approach by executing a cost-benefit analysis. The existing literature regarding the Coreper provides expertise concerning the legal framework and the challenges and opportunities of a higher level of transparency. Furthermore, information obtained during guest lectures will be analysed. This expertise will be used in order to test the hypotheses and answer the research question. The research question reads: ‘To what extent is a higher level of transparency in the decision-making process within the Coreper desirable?’ This article shows that a higher level of transparency regarding the process of decision-making is undesirable, whereas a higher extent of openness should be given to the results of the decision-making process.

1. Introduction

On 25 July 2001, the debate about the perceived lack of transparency and openness in the European decision-making processes - which impede control and accountability, undermine public confidence in the EU, and enhance the democratic deficit - resulted in the publication of a White Paper called ‘European Governance’ by the Commission.² The Treaty of Lisbon, which entered into force on 1 December 2009, also emphasises the importance of transparency within the European decision-making.³ The topic under examination in this article, the Committee of Permanent Representatives (Coreper), is regarded far from transparent. The meetings of the Coreper are behind closed doors and its minutes are not made public. Furthermore, the Coreper is characterised by a lack of accountability, since the committee is not accountable to a parliament.⁴

¹ Remark: Coreper is the abbreviation of *Comité des représentants permanents*.

² Héritier, ‘Composite democracy in Europe: the role of transparency and access to information’, 10 *Journal of European Public Policy* 5 (2003), 821; Commission’s White Paper on European Governance COM(2001) 428 final.; Stasavage, ‘Does Transparency Make a Difference?: The Example of the European Council of Ministers’, London School of Economics (9 October 2005), 2; D. Stasavage, ‘Open Door or Closed-Door?: Transparency in Domestic and International Bargaining’, 58 *International Organization*, (Fall 2004), 667-668, 694.

³ http://europa.eu/lisbon_treaty/glance/democracy/index_en.htm, visited on 4 December 2010; D. Dinan, *Ever Closer Union: An Introduction to European Integration*, (Palgrave Macmillan, 2005), 243.

⁴ D. Chalmers, 2010, 75; J. de Zwaan, 1995, 91-92; D. Dinan, 2005, 251. Remark: Coreper is the abbreviation of *Comité des représentants permanents*.

This article attempts to examine whether a higher level of transparency is possible and desirable within the provided legal framework. A common starting point in Political Science for studying decision-making processes is the rational model. This model calculates the costs and benefits of decision-making processes.⁵ This rational approach will be applied to assess whether a higher level of transparency of decision-making within the Coreper is desirable. The existing literature regarding the Coreper provides expertise concerning the legal framework by which the members are bound and the advantages and disadvantages of a higher level of transparency. This expertise will be used in order to analyse whether a higher level of transparency is desirable. In order to test the hypotheses and answer the research question a literature study will be conducted and data obtained during guest lectures will be analysed. The central question this article attempts to answer is: ‘To what extent is a higher level of transparency in the decision-making process within the Coreper desirable?’

In the first chapter, the framework of analysis, encompassing the legal and theoretical framework and the research design, is described. The second chapter focuses on the origins, functions, tasks, competences and powers of the Coreper. In the third chapter, a cost-benefit analysis is made regarding the desirability of a higher level of transparency in the Coreper. In the concluding chapter, the findings of the research are summarised and the opinion of the author is presented.

2. *Framework of Analysis*

2.1 Legal Framework

This section presents the legal framework the members of the Coreper must act within. It starts-off by mentioning the articles which were important for the establishment of the Coreper.⁶ This is followed by a section which presents the articles that form the legal frame by which the members of the Coreper are bound.

The articles important for the establishment of the Coreper were Article 151 EEC and Article 121 Euratom which stipulate that: ‘The Council shall adopt its Rules of Procedure. These Rules of Procedure may provide for the formation of a committee made up of representatives of Member States. The Council shall determine the tasks and competences of the Committee.’⁷

This section deals with the articles which provide the legal frame within which the members of the Coreper must act. On 15 April 1958, the duties of the Coreper were laid down in Article 16 of the Provisional Rules of Procedure for the EEC and Euratom Council of Ministers. The aforementioned article provides that:

“There is hereby, in accordance with the second paragraph of Article 151 of the Treaty, a Committee consisting of Representatives of the Member States.

The Committee shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council. It may set up working groups and

⁵ J. Goldstein, *International Relations*, (Pearson Longman, 2005), 145.

⁶ Remark: An explanation of the origins of the Coreper are given in chapter 2.1.

⁷ J. de Zwaan, 1995, 7.

instruct them to carry out such preparatory work or studies as it shall define. Unless the Council decides otherwise, the Commission shall be invited to be represented in the work of the Committee and of the working groups.

*The Committee shall be presided over by the delegate of the Member State whose representative is President of the Council. The same shall apply to the working groups, unless the Committee decides otherwise.*⁸

On 1 July 1967, the Merger Treaty entered into force and in fact repealed Article 151 EEC and Article 121 Euratom.⁹ Article 4 of the aforementioned Treaty provides that: ‘A Committee consisting of Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council.’¹⁰

On 1 November 1993, the Treaty on the European Union (TEU) entered into force and incorporated the content of Article 4 of the Merger Treaty. Furthermore, the substances of Article 151 EEC and Article 121 Euratom were reintroduced by the TEU. Moreover, the rules governing the Coreper were also laid down in the ECSC Treaty.¹¹ The text of the article stipulates that: ‘A committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council [...]’¹²

Currently, the rules governing the Coreper can be found in Article 16(7) TEU and Article 240(1) TFEU. Article 16(7) TEU stipulates that: ‘A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.’ Article 240(1) TFEU provides that: ‘A Committee consisting of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. The Committee may adopt procedural decisions in cases provided for in the Council’s Rules of Procedure.’

Several articles in the Council’s Rules of Procedure (RoP) mention the duties of the Coreper. Most important in this regard is Article 19 RoP which encompasses all duties laid down in the other articles of the RoP. The aforementioned article stipulates:

(1). Coreper shall be responsible for preparing the work of all the meetings of the Council and for carrying out the tasks assigned to it by the Council. It shall in any case ensure consistency of the European Union’s policies and actions and see to it that the following principles and rules are observed:

- (a) the principles of legality, subsidiarity, proportionality and providing reasons for acts;*
- (b) rules establishing the powers of Union institutions, bodies, offices and agencies;*
- (c) budgetary provisions;*
- (d) rules on procedure, transparency and the quality of drafting.*

(2). All items on the agenda for a Council meeting shall be examined in advance by Coreper unless the latter decides otherwise. Coreper shall endeavour to reach agreement

⁸ Ibid., 11.

⁹ Ibid., 13.

¹⁰ D. Freestone et al, *The Institutional Framework of the European Communities*, (Croom Helm, 1988), 192; J. de Zwaan, 1995, 11.

¹¹ J. de Zwaan, 1995, 13-14. Remark: The European Coal and Steel Community (ECSC) expired in 2002.

¹² Ibid., 14.

at its level to be submitted to the Council for adoption. It shall ensure adequate presentation of the dossiers to the Council and, where appropriate, shall present guidelines, options or suggested solutions. In the event of an emergency, the Council, acting unanimously, may decide to settle the matter without prior examination.

(3). Committees or working parties may be set up by, or with the approval of, Coreper with a view to carrying out certain preparatory work or studies defined in advance [...].

(4). Coreper shall be chaired, depending on the items on the agenda, by the Permanent Representative or the Deputy Permanent Representative of the Member State which holds the Presidency of the General Affairs Council [...].

(7). In accordance with the relevant provisions referred to below, Coreper may adopt the following procedural decisions, provided that the items relating thereto have been included on its provisional agenda at least three working days before the meeting. Unanimity on the part of Coreper shall be required for any derogation from that period (1):

(a) decision to hold a Council meeting in a place other than Brussels or Luxembourg (Article 1(3));

(b) authorisation to produce a copy of or an extract from a Council document for use in legal proceedings (Article 6(2));

(c) decision to hold a public debate in the Council or not to hold in public a given Council deliberation (Article 8(1), (2) and (3));

(d) decision to make the results of votes and the statements entered in the Council minutes public in the cases laid down in Article 9(2);

(e) decision to use the written procedure (Article 12(1));

(f) approval or amendment of Council minutes (Article 13(2) and (3));

(g) decision to publish or not to publish a text or an act in the Official Journal (Article 17(2), (3) and (4));

(h) decision to consult an institution or body wherever such consultation is not required by the Treaties;

(i) decision setting or extending a time limit for consultation of an institution or body;

(j) decision to extend the periods laid down in Article 294(14) of the TFEU;

(k) approval of the wording of a letter to be sent to an institution or body.”¹³

This article reflects the main aim of the Coreper, namely ‘maximising agreement’ not only in the Coreper, but also in the Council.¹⁴ The main topic of this article, transparency, is also addressed in a provision, namely article 5(1) RoP which stipulates that: ‘The Council shall meet in public when it deliberates and votes on a draft legislative act. In other cases, meetings of the Council shall not be public except in the cases referred to in Article 8.’¹⁵ By analogy it can be established that in case the meetings of the Council shall not be public, the Coreper’s meetings to prepare the work of the Council shall also not be public.

¹³ Council’s Rules of Procedure (RoP) (2009/937/EU), *Official Journal of the European Union* (11-12-2009), L325/46-47.

¹⁴ D. Bostock, ‘Coreper Revisited’, 40 *JCMS* 2, (2002), 225.

¹⁵ Council’s Rules of Procedure (RoP) (2009/937/EU), *Official Journal of the European Union* (11-12-2009), L325/40.

2.2 Theoretical Framework

A rational approach is used to assess whether a higher level of transparency of decision-making is desirable within the Coreper. Therefore, a cost-benefit analysis will be executed in order to examine to what extent transparency is costly or beneficial. Consequently, a challenges and opportunities frame will be established.¹⁶

2.3 Research Design

Currently, the decision-making procedure within the Coreper is considered to be far from transparent.¹⁷ During his guest lecture Mr. De Grave claimed that a higher level of decision-making within the Coreper is undesirable. He argues that ambassadors do not easily change their positions when the debates within the Coreper are made public. Consequently, the debates behind closed doors, which bring about a ‘mystic sphere’, are the ground for the effective functioning of the Coreper.¹⁸ On the basis of this information the following hypothesis can be formulated: “A higher level of transparency concerning the functioning of the Coreper is undesirable.”

The Commission’s White Paper on ‘European Governance’ and the Lisbon Treaty show that emphasis is put on achieving a higher level of transparency regarding EU decision-making.¹⁹ Member of the European Parliament, Ms. Liotard, argues that definitively something has to be changed about the level of transparency of decision-making within the Coreper. The Coreper can be very influential, consequently more information needs to be communicated to the public.²⁰ Phrased as an alternative hypothesis: “A higher level of transparency in decision-making within the Coreper is desirable.”

This section focuses on operationalising the independent variable (transparency), the dependent variable (the functioning of the Coreper) and the concept desirability, followed by a section in which the method of data collection is discussed. Attention is paid to the main limitation of the research design.

The independent variable of this research is transparency. According to Héritier ‘[t]ransparency and access to information determine who has the right to know who the decision-makers are, what procedures they employ, what their areas of interest are, and what the consequences of their decisions are.’²¹ The dependent variable of this research is the functioning of the Coreper which is explained in chapter 2.2. The concept desirability is defined by efficient decision-making within the Coreper.

Information stems for primary and secondary sources. During guest lectures students had the opportunity to ask questions to a civil servant working at Coreper and a member of the European Parliament. Secondary sources include law books, academic and

¹⁶ J. Goldstein, 2005, 145. Remark: A common starting point in Political Science for studying decision-making processes is the rational model. This model calculates the costs and benefits of decision-making processes.

¹⁷ D. Chalmers, 2010, 75; J. de Zwaan, 1995, 91-92.

¹⁸ Lecture by Mr. M. de Grave at Maastricht University on 15 November 2010.

¹⁹ Héritier, 10 *Journal of European Public Policy* 5 (2003), 821; Commission’s White Paper on European Governance COM(2001) 428 final.; Stasavage, London School of Economics (9 October 2005), 2; http://europa.eu/lisbon_treaty/glance/democracy/index_en.htm, visited on 4 December 2010.

²⁰ Lecture by Ms K. Liotard at Maastricht University on 19 November 2010.

²¹ A. Héritier, 10 *Journal of European Public Policy* 5 (2003), p. 819.

magazine articles and books. The closed nature of the meetings of the Coreper bring about limitations to the information available.

3. *Background*

3.1 Origin of the Coreper

On 23 July 1952, the European Coal and Steel Community (ECSC) entered into force and before long it became evident that effective decision-making in the Special Council of Ministers could not be achieved without extensive preparation. Consequently, the Council decided that each minister should appoint a representative. On 2 February 1953, the Council asked a working party to research the desirability of establishing a committee tasked with the coordination of the proceedings of the Council. On 7 February 1953, the Council agreed to the suggestions provided by the working party which resulted in the alteration of the Provisional Rules of Procedure of the Special Council. The Committee was called the Co-ordination Committee (COCOR) and its first meeting was held on 5 March 1953. This non-permanent Committee, consisting of officials from the national capitals, prepared the meetings of the Council and carried out studies and tasks assigned to it by the Council. Whereas it initially did not have decision-making powers it developed into an important instrument for decision-making.²²

On 25 March 1957, the Treaties of Rome (the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom)) were signed. Both Treaties contained a provision (Article 151 EEC and Article 121 Euratom) which provided for the possibility of establishing a committee made up of representatives of the Member States. On 25 January 1958, the first meeting of the EEC and Euratom Council of Ministers was held. During this meeting a Committee of Representatives was established, consisting of experts, in order to monitor the proceedings of these two Councils. In contrast to its forerunner, the COCOR, this Committee consisted of *Permanent* Representatives (permreps) of the Member States. Consequently, the function of the Permanent Representative is characterized by a dual nature, since he/she promotes the interests of its Member State and acts as an ambassador of the EU to its country.²³

3.2 Functions, Tasks, Competences and Powers of the Coreper

The Coreper is divided in Coreper I, consisting of the deputy Permanent Representatives, and Coreper II, composed of the ambassadors who are also called Permanent Representatives. Coreper I deals with technical matters and is responsible for issues concerning environment, social affairs, internal market and transport. Coreper II is concerned with more sensitive issues such as political (e.g. external relations), economic,

²² J. de Zwaan, 1995, 5-6.

²³ Zwaan, 1995, 7-10, 26; D. Dinan, 2005, 47; J. Lewis, 'Is the 'Hard Bargaining' Image of the Council Misleading?: The Committee of Permanent Representatives and the Local Elections Directive', 36 Journal of Common Market Studies 4 (December 1998), 483.

financial affairs and institutional matters.²⁴ Members of the Coreper take a 'political informed view' and deal with the technical matters of a dossier. In short, they attempt to solve 'political but technical' problems.²⁵

The Coreper coordinates the work of the Council and acts as a fixer and trouble-shooter.²⁶ The formal duties of the Coreper consist of preparing the work for all the Council meetings irrespective of their composition, and carrying out the tasks assigned to it. The decision-making powers are attributed to the Council, and apart from the decisions on Council procedure, the Coreper does not take formal decisions. However, the power of the Coreper lies in this preparatory work. More specifically in setting up the agenda for the Council's meeting, and discussing the core of almost all issues on this agenda.²⁷ During the discussions about the topics on the agenda, the Coreper divides them into 'A' and 'B' matters. 'A' items involve technical matters on which agreement is reached. The Council will agree on these matters without discussing them. Consequently, in fact the Coreper decides on these matters. In contrast, 'B' points are discussed and decided by the Council. Various scholars claim that the majority are 'A' matters which means that in effect the majority of the issues are decided by the Coreper. The decisions of the Coreper are based on the findings of the Working Groups.²⁸ The Working Groups are established and monitored by the Coreper.²⁹ Furthermore, the members of the Coreper sit next to the minister during the Council's meetings in order to assist by giving advice. Moreover, in case the minister is absent, the Permanent Representative leads the national delegation.³⁰ Bieber and Palmer claim that 'a very great deal of completely undefined power has been handed over to the Permanent Representatives.'³¹ Consequently, the Coreper plays an important role in (behind-the-scenes) EU decision-making, and several scholars claim that Coreper has evolved into a '*de facto* decision-making body'.³²

²⁴ D. Chalmers, 2010, 74; http://europa.eu/scadplus/glossary/coreper_en.htm, visited on 2 December 2010; D. Dinan, 2005, 250; J. Lewis, 36 *Journal of Common Market Studies* 4 (December 1998), 482.

²⁵ D. Bostock, 40 *JCMS* 2, (2002), 226, 230; Lecture by Mr. M. de Grave at Maastricht University on 15 November 2010.

²⁶ J. de Zwaan, 1995, 71-73; D. Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), 74-75; D. Bostock, 40 *JCMS* 2, (2002), 215.

²⁷ J. de Zwaan, 1995, 71-73; D. Chalmers, 2010, 74-75; D. Bostock, 40 *JCMS* 2, (2002), 216; D. Dinan, 2005, 240.

²⁸ J. de Zwaan, 1995, 73-77; D. Chalmers, 2010, 74; Dinan, 2005, 247; Stasavage, London School of Economics (9 October 2005), 10.

²⁹ D. Dinan, 2005, 250.

³⁰ Remark: The Coreper plays a role in the co-decision procedure. D. Bostock, 40 *JCMS* 2 (2002), 216, 218.

³¹ Bieber and Palmer as cited by J. Lewis, 36 *Journal of Common Market Studies* 4 (December 1998), 482.

³² D. Dinan, 2005, 249; D. Bostock, 40 *JCMS* 2, (2002), 232; J. Lempp et al., 'The Prevention of Deadlock through Informal Processes of 'Supranationalization': The Case of the Coreper, 30 *European Integration* 4 (September 2008), 513; J. Lewis, 'The Methods of community EU decision-making and administrative rivalry in the Council's infrastructure' 7 *Journal of European Public Policy* 2, (June 2000), 261, 263; R. Heinisch et al., 'Corper: Stealthy Power Brokers or Loyal Servants To Their Government Masters?: The Role of the Committee Of Permanent Representatives In a Changing Union', paper prepared for the European Union Studies Association Conference in Austin, Texas (15 March 2005), 1, 23.

4. Analysis

4.1 Desirability of a Higher Level of Transparency of Decision-making within the Coreper

The Coreper is considered to be far from transparent. Since, the nature of its meetings are closed, no verbatim report is drawn up during the deliberations, and the committee is not accountable to a parliamentary assembly.³³ Ironically, the Coreper was tasked by the Council with finding methods to implement transparency.³⁴ Therefore, it becomes even more appealing to see what the opportunities of a higher level of transparency within the decision-making of the Coreper entail.

A higher level of transparency of decision-making within the Coreper makes it easier to observe actions and trace back from policy choices the standpoint a representative took in order to pursue its interests.³⁵ Consequently, in case a high level of transparency in decision-making exists, the chances are higher to trace back a “biased” member of the Coreper and as a result he/she can more easily be ‘disciplined’.³⁶

According to Dinan, the Council’s opaqueness weakened the public confidence in the EU and was a ‘major cause’ of the democratic deficit.³⁷ By analogy it can be established that the Coreper which is even more secretive than the Council brings about the same results.³⁸ The Coreper is described as the ‘heart of Europe’.³⁹ Dinan claims that ‘in certain cases, Coreper is the EU’s real legislature’.⁴⁰ Consequently, in order to strengthen the public confidence in the EU and decrease the democratic deficit, a higher level of transparency of decision-making within this highly influential committee is needed.⁴¹ However, not only transparency is needed concerning the actions of the members of the Coreper, also accountability of their actions is essential to enhance the undermined public confidence and decrease the democratic deficit.⁴² Consequently, transparency is beneficial in the sense that it makes government officials easier accountable for their actions.⁴³

³³ D. Chalmers, 2010, 75; J. de Zwaan, 1995, 91-92.

³⁴ D. Dinan, 2005, 243.

³⁵ Stasavage, London School of Economics (9 October 2005), 3, 5-6; D. Stasavage, 58 *International Organization*, (Fall 2004), 668.

³⁶ Stasavage, London School of Economics (9 October 2005), 3, 5-6.

³⁷ D. Dinan, 2005, 243.

³⁸ D. Dinan, 2005, 251; Stasavage, London School of Economics (9 October 2005), 10.

³⁹ J. Lempp et al., 30 *European Integration* 4 (September 2008), 511.

⁴⁰ D. Dinan, 2005, 251. The view of Dinan is supported by an article published in the Economist: Unknown journalist, ‘Europe’s managing board’, 348 *Economist* 8080 (8 August 1998).

⁴¹ D. Dinan, 2005, 249-250.

⁴² D. Dinan, 2005, 251; Stasavage, London School of Economics (9 October 2005), 11; D. Stasavage, 58 *International Organization*, (Fall 2004), 668. Remark: The literature on ‘deliberative democracy’ emphasises the benefits of public deliberations.

⁴³ D. Stasavage, 58 *International Organization*, (Fall 2004), 672, 690.

4.2 Undesirability of a Higher Level of Transparency of Decision-making within the Coreper

Every delegation needs to obtain successes in order to prevent loss of face of the Member State they represent. However, every delegation knows that it is more or less impossible, because of opposite interests, to get one's own way on every issue discussed. Consequently, delegations will divide issues in key and minor matters. Horse-trading, which might bring about package deals, is needed in which delegations try to get one's way preferably on key issues. Minor issues can be used during the negotiations, by giving in on them, to obtain successes regarding key issues.⁴⁴

First of all, it is important to mention that the legal framework, especially Article 5(1) RoP, provides for the opportunity to keep decision-making secret within the Coreper. Horse-trading is not possible in public, since the focus will be on the issues on which a delegation had to give in, often forgetting that this was needed to obtain successes on other issues. This will result in a loss of confidence in politicians. In order to prevent a deadlock (i.e. inefficiency), in which delegations are not willing to give in, horse-trading takes place in informal settings behind closed doors.⁴⁵ The closed nature of the meetings of the Coreper brings about a higher level of openness amongst the members of the Coreper. Ambassadors are aware that the information they provide will be handled in a confidential way, and they are therefore more inclined to provide information during these meetings.⁴⁶ De Zwaan argues that this is desirable, since issues discussed during the meetings will be analyzed extensively and every possible solution can be considered.⁴⁷ In case meetings are held behind closed doors it is not only possible to review all possible solutions, but also the best solution can actually be chosen. Since, in case the meetings are made public it becomes likely that capitals cable to their representatives that they have to choose the solution that satisfies best the interests of the citizens of its Member State (i.e. politically correct solutions) instead of choosing the best solution available.⁴⁸ Furthermore, it is often easier to explain a complete package deal instead of all details and intervening steps to the public.⁴⁹

Moreover, interest groups can have an excessive influence on policy-making, and through keeping these interest groups out of the initial bargaining stages, by restraining

⁴⁴ Knowledge gathered during the study Political Science and extracurricular activities at Leiden University; R. Heinisch et al., paper prepared for the European Union Studies Association Conference in Austin, Texas (15 March 2005), 14.

⁴⁵ Remark I: The Coreper is efficient because it works behind closed doors (i.e. secret). Remark II: in order to prevent a deadlock a 'culture of compromise' exists within the Coreper. J. Lempp et al., 30 *European Integration* 4 (September 2008), 511-512, 515-516; Stasavage, London School of Economics (9 October 2005), 6; D. Dinan, 2005, 243; D. Stasavage, 58 *International Organization*, (Fall 2004), 668, 670, 690, 693.

⁴⁶ J. de Zwaan, 1995, 91; Stasavage, London School of Economics (9 October 2005), 7.

⁴⁷ J. de Zwaan, 1995, 91; Stasavage, London School of Economics (9 October 2005), 14-15; D. Stasavage, 58 *International Organization*, (Fall 2004), 694.

⁴⁸ Remark I: Politicians want to be re-elected by its citizens and are therefore influenced by their preferences. Remark II: The so-called 'political correctness effect' results in inefficient decision-making. Stasavage, London School of Economics (9 October 2005), 6-7, 14-15; D. Dinan, 2005, 243; D. Stasavage, 58 *International Organization*, (Fall 2004), 669-670.

⁴⁹ Stasavage, London School of Economics (9 October 2005), 7.

them from participating in the initial stages of the negotiation process, the extreme level of influence can be mitigated to a normal level.⁵⁰

Not only must a Permanent Representative take into account the interests of the Member State he/she represents. An ambassador is as a member of the Coreper also acting as an ambassador of the EU to its Member State and in that position he/she tries to reach agreement.⁵¹ The ambassadors are bound by a 'dual loyalty', since they need to obtain successes for the countries they represent, but he/she also wants to attain successes for the European Union as a whole.⁵² The civil servants who join the Coreper have to adapt to the 'collective culture' which involves the so-called 'standards of appropriateness'.⁵³ According to Lewis components of the 'standards of appropriateness' are 'a duty to "find solutions" and keep the legislative agenda of the Council moving forward.'⁵⁴ It is superfluous to say that the interests of the EU can differ from the interests of the Member States, the citizens of the Member States and interest groups.

Consequently, the Permanent Representative has to wear a 'Janus-face' which refers to the Roman God Janus who is facing in two directions.⁵⁵ A lot of interests are in play, and in order to achieve the best results he/she must not show one's cards immediately, because that makes his/her negotiation position weaker. The Permanent Representative has to play with them in order to try to achieve the best results. In case the cards are made public it is of no use to play anymore.

Finally, a higher level of transparency in the Coreper might be irrelevant, since the decision-making will probably move to another platform and/or location.⁵⁶

5. Conclusion

In this section the research question will be answered: 'To what extent is a higher level of transparency of the decision-making process within the Coreper desirable?'

A higher level of transparency makes it easier to trace back the stances of influential government officials and as a result it is easier to discipline them. Moreover, government officials can be held accountable (i.e. responsible) for their actions. A higher level of transparency will enhance the public confidence in EU decision-making and decrease the democratic deficit.

The arguments in favour of the status quo (i.e. lack of transparency) are manifold. First it is important to mention that the legal framework provides for secrecy. Secondly, the Coreper is able to bring about efficient policy-making (i.e. prevent deadlocks), because it works in secret. Since, secrecy enables the members of the Coreper to consider and discuss all options, enhances the chance of choosing the best options (i.e. producing the best possible package deal). Next to this, the meetings behind close doors prevent the members of the Coreper from undue influence of interest groups. Fourthly, in

⁵⁰ Ibid.

⁵¹ J. Lewis, 36 *Journal of Common Market Studies* 4 (1998), 483; D. Bostock 'Coreper Revisited', 40 *JMCS* 2, 217.

⁵² D. Bostock, 40 *JMCS* 2, 217.

⁵³ J. Lewis, 'Socialization and Everyday Decision Making in the European Union', 59 *International Organization*, (Fall 2005), 937-939.

⁵⁴ Ibid., 939.

⁵⁵ D. Bostock, 40 *JMCS* 2, 217; J. Lewis, 59 *International Organization*, (Fall 2005), 939.

⁵⁶ Stasavage, London School of Economics (9 October 2005), 3, 16-17.

case the Permanent Representative shows its cards immediately it is no longer possible to play the game, or in other words it would weaken its bargaining position. Finally, a higher level of transparency of decision-making within the Coreper would be irrelevant, since the secretive bargaining would probably move to another platform and/or place.

In my opinion the arguments in favour of the status quo are strong, especially the argument concerning irrelevancy. Since it is not known where the secret negotiations go after making the decision-making process within the Coreper more transparent. However, the undermined public confidence in the EU and the democratic deficit bring about serious consequences for the development of an ever closer Union. Consequently, I would like to propose an intermediate approach in which more awareness is given to the results, but not the decision-making process that leads to these results.

IS THERE A NEED TO REFORM THE SYSTEM OF PRELIMINARY REFERENCE PROCEDURES?

Anna Bolz

Abstract: Preliminary reference procedures represent undeniably the highest workload for the Court of Justice and are therefore subject to extensive delays, approximately 17 months in 2009. Since the caseload of the Court has increased enormously over the last years, calls for a need to reform became louder. This article aims at analyzing the increase in the number of preliminary references, to discuss what measures have already been taken to reduce the Court's workload and finally, to establish which measures could be taken to improve the situation further. The issue that I want to consider herein is not how the preliminary reference procedure is organized but how it can be made more efficient and particularly, how the enormous workload and the coinciding delays can be reduced. Eventually, after having considered various reform proposals, I conclude this article by presenting the recommendation that, within the system of the preliminary reference procedure, more power should be granted to the national judges themselves. In this respect, the domestic judiciaries should be competent to deliver draft answers when framing their references.

1. Introduction: The Framework of the Preliminary Reference Procedure

Within the framework of the European Union, individual Member States and especially national courts play a fundamental role in the functioning of the European legal order. National courts are integrated in the Community courts structure and must ensure that the preliminary reference procedure is executed as smoothly as possible to secure that citizens can enjoy their rights granted by European law to the fullest extent. National judges play thus an indispensable and central role in the Union judicial system as they are both the gate-keepers as well as the agenda-setters when it comes to the question of referring a preliminary question to the Court of Justice. Moreover, national courts need certain guidelines along which they can decide cases involving EU law, otherwise its conform and uniform interpretation would be seriously undermined.

As regards the enforcement of European Union law, national law courts are the ones responsible for the process of adjudication within their national legal system.¹ Preliminary ruling references and the subsequent answer of the Court of Justice are thus to be regarded as rather interlocutory to the main action that remains to be settled by domestic judges. This implies that effective judicial protection of Union rights as well as the uniformity of interpretation and application of Union law depends to a large extent on the competence of the individual Member State.² Within this system, the preliminary reference procedure is an Union law remedy that aims at ensuring that both protection of EU law granted rights as well as uniform interpretation of Union law are guaranteed.³ It

¹ W. van Gerven, *Of Rights, Remedies and Procedures*, 37 CML Rev. (2000), 501-536.

² *Ibid.*, p. 502.

³ *Ibid.*, p.533.

flows as a logical consequence from this that any delays within the preliminary reference procure may prejudice individuals' rights derived from Union law and have a direct impact on the consistent interpretation of the law in question. In addition to that, this procedure is an important tool through which the Court of Justice and national courts interact in a constant dialogue.⁴ The success of this mutual assistance can be established on the basis that crucial judicial decisions and general principles of European law were developed by means of this procedure.⁵ All in all, the preliminary reference procedure has eminently redounded to the accession and acceptance of European law in the national legal systems of the Member States.⁶ Due to limits in the size of the article, reforms that would be possible within the organizational and procedural structure (for example the translation service or the number and specialization of the judges) of the Court of Justice are not considered here. The focus is hence primarily on the reforms that have already been envisaged and those measures that could possibly improve the situation further.

2. *Increase in the Court's Workload and Corresponding Needs to Reform*

It has become a widespread contemplation that there is indeed an urgent need for judicial reform. The rationale is that extensive delays in the preliminary reference procedure are not the only detriment as such, but more prevalently, that the judicial process is enormously slowed down and national courts as well as private parties are stuck in the middle of it.⁷ In view of the risk that judicial stagnation is likely to gain further grounds, considerations as to how the system could be reformed are worth investigating.

Given the continuous expansion of the European Union over the past years and recent legal developments, it is unlikely that the high workload is just an interim incident.⁸ One example of such a recent development is that prior to the Treaty of Lisbon, there was a limitation on the references in the fields of immigration, asylum, civil justice and criminal justice. In the area of criminal justice, the Member State was competent to choose whether and which courts could refer a preliminary question to the Court of Justice. In the other fields, a preliminary reference was only possible if there was no judicial remedy available against the court decision.⁹ The Lisbon abolished this restriction and consequently, all courts have discretion to refer a preliminary question and only those against whose decision there is no judicial remedy are *obliged* to do so.¹⁰

⁴ Christiaan Timmermanns, *The European Union's Judicial System*, 41 CML Rev. (2004), 393-405.

⁵ Ibid. At this point one could possibly refer to the judicial developments of the principles of direct effect and supremacy in *Van Gend en Loos* (Case 26/62 [1963] ECR 1) and *Factortame* (C-213/89 [1990] ECR 2433).

⁶ Ibid.

⁷ Hjalte Rasmussen, *Remedying the crumbling EC judicial system*, 37 CML Rev. (2000), 1071-1112.

⁸ Sarah E. Strasser, *Evolution & Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References*, The Jean Monnet Center for International and Regional Economic Law and Justice (1995).

⁹ This restriction is to be found in Article 68 of the Treaty establishing the European Community. See Hugo Storey, *Preliminary references to the Court of Justice of the European Union (CJEU)*, draft paper to be published as an EALJA Guidance Note (2010).

¹⁰ Article 267 (2) TFEU provides that any court or tribunal of a Member State *may* request the Court of Justice to give a ruling, whereas Article 267 (3) TFEU, obliges courts against whose decision there is no judicial remedy under national law, to do so. See generally Hans van Meerten, *Een Europese Unie: efficiënt, transparant en democratisch*, Kluwer Law International, Den Haag (2004), p.86f.

But already before, discussion has been going on about whether in the view of the high influx of preliminary questions the Court is still able to deal with the matters efficiently and without unwarranted delay.¹¹ When negotiating the Treaty of Nice, various proposals made by the Due Report¹² were considered, some of which will subsequently be discussed in turn, but before, I would like to mention earlier endeavors of how to limit access to the preliminary reference procedure.

3. Measures Already Taken

Already in 1982, the Court of Justice ruled in the *CILFIT* judgment that:

*“the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.”*¹³

This judgment introduced the concept of ‘*acte clair*’ into the European legal system, albeit the restrictions are significantly stricter.¹⁴ This principle has found its statutory way into the Court of Justice Rules of Procedure and is now incorporated into the simplified procedure under Article 104 (3).¹⁵ More precisely, this procedure aims at more efficient time management by allowing the Court to deliver a reasoned opinion instead of a judgment in the circumstances outlined above.¹⁶

Besides, a so-called accelerated procedure has been established in Article 104a of the Rules of Procedure. This measure was drafted for situations of exceptional urgency, where the national court may request that the President exceptionally decides to apply an accelerated procedure, derogating from the provisions of these rules, to a reference for a

¹¹ For a general and throughout discussion see Luxembourg symposium, *Reflections on the preliminary ruling procedure* (30-31 March 2009).

¹² The Due Report was prepared by the Working Party for the European Commission in January 2000.

¹³ Case 283/81 *Cilfit* [1982] ECR 341. David Edward, *The preliminary reference procedure: constraints and remedies*, CCBE/College of Europe Colloquium, Bruges (1999). For the reception of the *CILFIT* judgment into national legal systems see Herman van Harten, *The application of Community precedent and acte clair by the Hoge Raad*, published in Conferentiebundel ‘Interface between the European Union and its member states’, Europa Law Publishing (2007).

¹⁴ These conditions include inter alia that the difference language versions of Union legislation have to be taken into account and that every provision must be interpreted in the light of the provisions of Union law as a whole. The language requirement means that the national court must be convinced that the matter is equally obvious to the courts of all Member States. In source cited *supra* note 4.

¹⁵ Ibid. Article 104 (3) Rules of Procedure of the Court of Justice provides that: ‘where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt, the Court may (...) give its decision by reasoned order in which, if appropriate, reference is made to its previous judgment or to the relevant case-law.’

¹⁶ For discussion see Mattias Derlén, *Multilingual interpretation of European law*, Kluwer Law International, Alphen aan den Rijn (2009), p. 79f.

preliminary ruling.¹⁷ Situations of urgency may for example occur if a person is subject to criminal proceedings and in custody while the preliminary reference is referred to the Court of Justice. Nevertheless, the accelerated procedure is extremely restricted by making the matters subject to the requirement of *exceptional* urgency. In the time from 2005 to 2009, the Court of Justice has only twice granted the application of such a procedure.¹⁸ Consequently, treatment granted under this procedure cannot be considered as a rule or an effective remedy for reducing delays.

In addition to that, Article 104b offers the possibility of an urgent preliminary ruling procedure. Again, its field of application is limited, this time for cases falling within the area of freedom, security and justice. As can be shown on the basis of the Court's statistics, the use of this procedure is restricted: In 2008, three requests were granted (three were refused) and in 2009, two were granted (and one was refused).¹⁹

However, as it became clear during the intergovernmental conference at Nice, the legislator was not fond of introducing drastic reforms that would transfer increased powers to the national courts of the Member States. Thus, it refused the proposal made by the Due Report suggesting to insert an addition to Article 267 TFEU (ex Article 234) which stipulated that domestic courts themselves should decide their questions on Union law.²⁰

Instead, a new Article 225 (3) EC²¹ was introduced by the Treaty of Nice which delegated limited powers to the Court of First Instance to deal with preliminary references. However, the judges of the Court of Justice remained doubtful whether this would eventually save any time at all.²² This issue of 'preliminary-competence sharing',²³ reveals that, although there being the awareness that commitment to judicial efficiency is strongly needed, agreement as to which measures are to be taken is far from realizable.

4. *More Power to the General Court?*

The above mentioned procedure under ex Article 255 (3) TEC is now to be found under Article 256 (3) TFEU which grants the General Court (ex Court of First Instance) the power to hear and decide questions referred for a preliminary ruling under Article 267 TFEU. This power is restricted as it is only given in specific areas, to be laid down by

¹⁷ Symposium Council of State (the Netherlands), *The uncertain future of the preliminary rulings procedure* (January 2004).

¹⁸ Statistics of the Court of Justice: Annual Report 2009. *Miscellaneous* – Expedited and accelerated procedures (2005-09) and generally see Eric Barbier de la Serre, *Accelerated and Expedited Procedures before the EC Courts: A Review of the Practice* 43 CML Rev. (2006) 796-801.

¹⁹ *Miscellaneous*- Urgent preliminary ruling procedure (2008-09).

²⁰ In source cited *supra* note 17.

²¹ Article 225 (3) TEC reads as follows: "(1) The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 EC, in specific areas laid down by the statute. (2) Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling. (3) Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected." For more information see Carl Baudenbacher, *Concentration of preliminary references at the ECJ or transfer to the High Court/CFI*, European Constitutional Law Network, p.267.

²² See Hjalte Rasmussen, *Present and future European judicial problems after enlargement and the post-2005 ideological revolt*, 44 CML Rev. (2007), 1661-1687.

²³ *Ibid.*

Statute. Despite this, no case has been referred to the General Court up until now.²⁴ In order to explain this circumstance, one is inclined to compare both the General Court's and the Court of Justice' annual caseload: in 2009, the General Court was faced with 568 new cases, completed 555 cases and had 1191 cases pending,²⁵ while the Court of Justice received 561 new cases, completed 588 cases and had 741 cases pending.²⁶

Given that the caseload of the Court of Justice is comparatively smaller than that of the General Court, shifting more cases to the latter is no satisfactory solution to the problem either.²⁷ In order to transfer cases to the jurisdiction of the General court, an increase in the court's capacity and thus in the number of its judges seems to be an inevitable precondition.²⁸

5. *Endorsing National Courts to Submit Draft Answers?*

By empowering national courts to suggest 'draft' answers to their preliminary questions, the Court of Justice's amount of time dealing with those references would be significantly reduced.²⁹ Furthermore, this procedural reform would circumvent the detrimental and the adverse effects of limiting national courts' access to preliminary references. Another advantage would be that national courts are probably more concerned when instituting their questions and additionally, that they would acquire a higher degree of acquaintance with European law.³⁰ However, one of the main disadvantages of this approach is that the national judiciary must have a certain basic degree of knowledge and understanding of the European law in question.³¹ It is argued that this basic knowledge is still lacking in many Member States (*Informationsdefizit*) since European law is not granted the same status as national law when it comes to the training and the education of judges.³²

According to this criticism, domestic judges who are uncertain as to how to frame their references would be deterred from actually making a preliminary reference in the first place.³³ One can nevertheless counter this line of argumentation by referring to the fact that each national court, even those with limited acquaintance of European law, has some kind of perception of what answer they expect. More importantly, if one would only *encourage* them, instead of *obliging* them to suggest a draft answer, this risk would be excluded right from the beginning on. Likewise, the decision to suggest an answer would be supported by the prospect of fewer delays in national proceedings.

²⁴ Broberg, *References for Preliminary Ruling*, Chapter 1 (2010).

²⁵ Statistics of the General Court: Annual report 2009. *General activity of the General Court* - New cases, completed cases, cases pending (2005-09).

²⁶ Statistics of the Court of Justice: Annual Report 2009. *General activity of the Court of Justice* - New cases, completed cases, cases pending (2005-09).

²⁷ In source cited *supra* note 23.

²⁸ Ibid. Article 48 of Protocol (No 3) on the Statute of the Court of Justice of the European Union limits the number of Judges to 27.

²⁹ In source cited *supra* note 21.

³⁰ Ibid.

³¹ Ibid.

³² Ingrid Schmidt, *Wie lässt sich die Zusammenarbeit mit den nationalen Richtern verbessern?*, Symposium mit den Präsidenten der Verfassungsgerichte und der obersten Gerichte der Mitgliedsstaaten beim Gerichtshof der Europäischen Gemeinschaften am 30. und 31. März 2009.

³³ Ibid.

6. *Statistics and the Question of either full Court or Chambers*

As statistics show, the number of references for preliminary rulings has been steadily increasing from 211 in 2005 to 302 in 2009.³⁴ These actions constitute, by far, the greatest caseload for the Court. In 2005, the number of completed cases in the field of references for a preliminary ruling amounted to 254 and increased to 259 in 2009. In view of this, it seems to be obvious that this enormous case load endangers the Court of Justice's effectiveness and is likely to lead to unbearable delays in national proceedings. As regards the average duration of proceedings, references for a preliminary hearing took about 20.4 months in 2005. The period of time, however, decreased to an average of 17.1 months in 2009.³⁵

This development may be explained by looking at the organization of the court while hearing these cases. The number of occasions where the court sat as the Grand Chamber decreased from 59 in 2005 to 41 in 2009, whereas more cases were heard and decided by Chambers: the number of cases heard by a Chamber of five judges increased from 250 to 283 and those adjudicated by Chambers of three judges increased from 154 to 166, respectively.³⁶ This development implies that more and more cases can be adjudicated simultaneously, thus reducing the amount of delays. Despite this advantage being obvious, its practical usage seems to be limited since Member States are not likely to accept meaningful cases being decided by anything less than a full court.³⁷

7. *How to Achieve Docket Control?*

If one starts to think about how to limit the number of preliminary references that reach the Court of Justice itself, the apparently simplest solution would be a reduction of the volume of cases.³⁸ The advantages of this are apparent: judges are given more time to adjudicate cases and to deliver cohesive judgments while the time of delay is likewise reduced.³⁹ However, disadvantages are correspondingly visible: cases that would have been capable of developing European law further might be barred from being discussed by the Court of Justice.⁴⁰ Moreover, this is also likely to hinder the uniform interpretation and interpretation of Union law. There are a variety of means by which this goal can be achieved. Each of them will be successively dealt with more in depth.

³⁴ In source cited *supra* note 26.

³⁵ Ibid. *Completed cases* - average duration of the proceedings (2005-09). .)

³⁶ Ibid. *Completed cases* – Bench hearing action (2005-09).

³⁷ Pursuant to Article 16(3) of Protocol (No 3) on the Statute of the Court of Justice, Member States that are a party to the proceedings may request the Court to sit in a Grand Chamber.

³⁸ For an extensive discussion of possible means to reduce the workload see source cited in *supra* note 1.

³⁹ Ibid.

⁴⁰ Ibid.

7.1 Granting more Discretion to National Courts or Limiting the Number of Courts that may Make a Reference?

Pursuant to Article 267 (2) TFEU, national courts against whose decision there is a judicial remedy are not obliged to refer a preliminary reference, but do already have a wide discretion to refer in any kind of proceedings and at any moment of the process. Similarly, also Article 267 (3) TFEU presupposes some degree of voluntariness, even though its wording may suggest otherwise. National courts are obliged to refer a preliminary question, however, this requirements rests on a deliberate willingness of the court since there are no corresponding Union sanctions for failure to make a reference.⁴¹ Consequently, the logical conclusion seems to be that discretion in this case refers rather to the question whether national courts have to be encouraged to make a reference instead of asking whether there is a need to make them refrain from referring. Another means would be to limit the number of courts that are competent to make a reference to the Court of Justice. As statistics show, an overwhelming majority of references are made by lower courts or specialized tribunals.⁴² This fact leads to the suggestion that the number of preliminary references may be limited by removing the right of first instance courts to refer. This measure would require that the second paragraph of Article 267 TFEU is to be made non-applicable and consequently, only courts from which there is no appeal would be competent to refer under the third paragraph. This suggestion has already been made: while negotiating the Treaty of Maastricht, Bundeskanzler Helmut Kohl proposed to remove the lower courts' right to refer, albeit this proposition was made for different reasons.⁴³

Again, also this approach includes serious implications. Removing first instance courts' right to refer is based on the presumption that cases which demand a preliminary ruling will indeed reach a Member State's Supreme Court, which can then make a reference.⁴⁴ This reform does not ensure that the most essential cases reach the Court of Justice, but would on the contrary contribute to a non-uniform interpretation and application of European Union law. This is mainly due to the fact that there is no guarantee that cases valuable for the further development of European law would indeed reach the highest court since this is mainly dependent upon the parties' financial resources and their willingness to endure and to continue the proceedings.⁴⁵ One might further think of the scenario that a judge of a lower court disrespects European law, thus depriving the party of specific rights. As this would leave the party without an effective remedy, it would clearly contravene the principle that Union citizens are entitled to the full enjoyment of rights granted by European law.⁴⁶

⁴¹ Ibid.

⁴² In source cited *supra* note 26. *General trend in the work of the court* (1952 – 2009) – New references for a preliminary ruling. Taking the example of France, only 88 cases were referred by the Cour de cassation and only 47 by the Conseil d'État, whereas 648 preliminary questions were posed by other courts and tribunals. The same goes for Germany, where 1156 references were made by other courts or tribunals and only 128 by the Bundesgerichtshof.

⁴³ When making this suggestion, Bundeskanzler Kohl did not think about reducing the Court's workload, but rather expressed his dissatisfaction with various lower Court decisions on social policy questions. In source cited *supra* note 4, p.396.

⁴⁴ In source cited *supra* note 8.

⁴⁵ Ibid.

⁴⁶ In source cited *supra* note 17, p.4.

7.2 A Move towards Restrictions of Cases most Likely to Affect the Uniformity of European Law?

Reducing the workload of the Court of Justice by limiting the access to the Court under Article 267 TFEU is also possible by other means. A selective procedure could for example introduce a formal filtering procedure which functions as to assess the substance of the requests.⁴⁷ Consequently, references would be eliminated on a content-based approach and more importantly, the Court would be enabled to only concern itself with cases that have an important impact on Union law and thus, leave the adjudication of more trivial cases to other courts. This approach finds a real life example in the procedure of the United States Supreme Court: the Court is competent to grant a writ a certiorari, in which it decides whether to grant the parties standing and to adjudicate the matter.⁴⁸

It is argued by opponents that this approach contorts judicial cooperation and places the Court of Justice in a situation from which it may select cases and avoid more delicate issues.⁴⁹ Nevertheless, it is evident that not every question about European law that arises in national proceedings is equally important for the uniformity of the law as such. It seems therefore to be impractical to demand that each and every question is dealt with by the Court of Justice itself.⁵⁰ Moreover, there is no effective mechanism in place yet that filters the cases according to their impact on the consistency of Union law and as already outlined above, simply shifting the workload to the General Court is no satisfactory solution either.

As regards this issue, it is argued that the elucidation lies at the level of the national judiciaries themselves which are considered to be sufficiently competent to undertake more functions when it comes to the interpretation and application of European Union law.⁵¹ This line of reasoning however presupposes that national judges are well trained and have a profound knowledge of the respective area of European law, otherwise, they are not likely to live up to their duties in a satisfactory manner. The fact that this prerequisite is a sensitive issue can be deduced from the mere existence of the preliminary reference procedure itself: if national judges were to be adequately trained and specialized in European law, the need for a procedure of preliminary questions (concerning the interpretation and application of the law) would not be existent in the first place.

At this point the argument about uniformity and coherence of European law steps in again.⁵² However, pushing for legal uniformity through the means of case law does not necessarily entail that every case has to be decided by the Supreme Court or the Court of Justice respectively.⁵³ This finds its daily life example reiterating in the legal system of the United States of America, where even lower courts are encouraged to contribute to the development of the law.⁵⁴

⁴⁷ Ibid.

⁴⁸ In source cited *supra* note 19.

⁴⁹ In source cited *supra* note 17, p.4f.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Jan Komárek, *In the Court (s) we trust? On the need for hierarchy and differentiation in the preliminary reference procedure*, Somerville College, University of Oxford, held at 14 May 2007.

⁵³ Ibid.

⁵⁴ Ibid.

Closely linked with this approach is that of establishing certain guidelines that determine the prescribed form and content of references.⁵⁵ This line has already been taken and can be analyzed along the Court's inadmissibility rulings: The Court of Justice has several times refused to deliver a preliminary ruling on the grounds that i) there was no genuine dispute⁵⁶, ii) the question referred was hypothetical⁵⁷ or iii) that an almost identical matter has already been adjudicated. To take the *Telemarsicabruzzo* case as an example, the Court has ruled that the reference must be clearly framed and must contain a profound comment on the facts as well as on the legal context so that it is sufficiently informed when ruling on the preliminary question.⁵⁸

This approach would therefore affirm the introduction of a 'standard-reference' which is capable of ensuring that all preliminary references are adequately submitted, thereby reducing the amount of time which the Court of Justice may otherwise have to spend in order to clarify the reference before it.

7.3 Decentralization and the Role of Regional courts

Instead of merely transposing the burden of the caseload to the General Court, the establishment of regional courts, as a set of courts intermediate between domestic courts and the Court of Justice, seems to be a valuable alternative.⁵⁹ These courts would then deliver an initial assessment of the reference substance and admissibility.⁶⁰ The evolving question is whether those courts would operate at a national, regional or Union level. Strong arguments are made for the latter, saying that regional courts should contribute to establishing an effective judicial system under the Court of Justice.⁶¹ They would then exercise jurisdiction for a limited number of national courts, thereby possibly reducing the overall caseload of the Court of Justice.⁶²

A drawback of this approach is the risk that the procedure at the regional courts is to reproduce the already time-consuming procedure, including necessary translation duties and Member States' right to submissions of observations, which already exists at the Court of Justice.⁶³

To initiate a few concluding remarks on the foregoing discussion, I would like to refer to Jan Komárek who reminds us that the preliminary reference procedure is 'a deviation from normal organization of the judicial process' and not a 'normal component'.⁶⁴ This procedure is practically incapable of bringing justice to each and every question. This may be possibly best demonstrated by describing the unavoidable delays already as components of injustice.⁶⁵ While this paper primarily focuses on the

⁵⁵ In source cited *supra* note 8.

⁵⁶ Case C-244/80 *Foglia v Novello* (No 2) [1982] ECR 3045.

⁵⁷ Case C-83/91 *Meilike* [1992] ECR I-4871 and Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393.

⁵⁸ *Ibid.*

⁵⁹ Gráinne de Búrca, Joseph Weiler, *The European Court of Justice*, Oxford University Press, Oxford (2001), p.207.

⁶⁰ Nigel Foster, *EU Law Directions*, Oxford University Press, Oxford (2008), p. 158.

⁶¹ De Búrca and Weiler, p.207.

⁶² J.-P. Jacque, J. Weiler, *On the road to European Union: A new judicial architecture: An agenda for the Intergovernmental Conference*, 27 CML Rev. (1990), 185.

⁶³ In source cited *supra* note 17.

⁶⁴ In source cited *supra* note 52, p. 9.

⁶⁵ *Ibid.*

possibilities of how to reform the preliminary reference procedure, I think that it equally became obvious which function not only the preliminary reference procedure as such, but also which important responsibilities the Court of Justice, the General Court and the national courts have taken over within the evolving legal system of the European Union.

8. Conclusion

As the previous discussion shows, there is certainly no lack of ideas of how to possibly make the system of preliminary ruling references more efficient and more convenient for litigants in national proceedings. Instead, the prevailing issue seems to be the failure and inability to actually agree and decide on acceptable and suitable solutions. It has crystallized that each proposal has its distinct advantages and disadvantages and even more generally, the decision between taking action and remaining inactive itself proves to entail two sides as well. One might for example think of political dissensions that are capable of outweighing and overshadowing any profits that reforms might bring about. However, it is equally obvious that there is a pressing need for the Court of Justice to become more efficient and more effective. Otherwise, if no substitute means are to be found, the uniform interpretation and application of European Union law is likely to be at stake. As Komárek puts it ‘the ultimate victim will be the integrity of European law’.⁶⁶

As regards measures that were already taken to bring about improvement, such as the accelerated procedure, it is apparent that these approaches do not represent valuable substitutes capable of reducing the Court of Justice’s caseload. Concerning the suggestions that have been made so far, the granting of more competence and thereby shifting the workload to the General Court is not satisfactory either: the overall caseload of the General Court is even higher than that of the Court of Justice and thus a transfer of preliminary references to the latter is only a transformation of the problem itself.

Even more controversial is the suggestion to remove courts of first instance right to refer a preliminary ruling. Although this would limit the overall number of cases that reach the Court of Justice, it is certainly not a guarantee that those cases which are important for the development of European law do indeed reach the highest court in the Member State so that a question could then be referred to the Court of Justice.

As regards the approach of empowering national courts to submit draft answers to their references, the main argument opposing this measure is that national judges lack the necessary knowledge of European law that is necessary to adjudicate the respective case in a satisfactory manner. However, if the judges are never granted the opportunity to interpret and apply European law, how should they reach a sophisticated level of acquaintance and familiarity when applying it? Of course, this presupposes that the judges are indeed trained and to some extent specialized in European law, but from my point of view this does not constitute an impossible endeavor.

I consider that granting more powers to national judges seems to be a very valuable solution. The legal system of the European Union is on a constant basis gaining more and more importance and thus national judges should be an active and involved part of it. By keeping national judges isolated in their legal systems and thereby excluding them from European Law, does not seem to be acceptable in the long run. Instead, they

⁶⁶ In source cited *supra* note 44.

should be trained in European law, maybe just in particular areas so that specialization is still possible, and be allowed to submit draft answers to their preliminary references. If the Court of Justice considers them to be wrong or incomplete, it is still competent to adjust or to correct them. But the amount saved by sticking to draft answers that do indeed include a valuable suggestion as to the question, is definitely worth the risk of introducing such a reform.

Consequently, any prospective reforms that are eventually agreed upon should be aimed at preparing and strengthening the Court of Justice's position within its current environment that is to be characterized as one of aggravated burden and workload. Of course the most effective procedural and structural changes within the system of the preliminary reference procedure and the Court of Justice are not the ones on which consensus is incontrovertibly and easily to be reached. But despite the problems political frictions will constitute, they seem without any doubt to be worth overcoming, otherwise we are faced with Komárek's vision of the dark future of the integrity of European Union law.

WHO CAN REFER PRELIMINARY RULINGS TO THE ECJ? - IS THE COURT TOO FLEXIBLE?

Eva Gillich

Abstract: This paper examines the preliminary ruling procedure according to Article 267 TFEU, the main institutional link between the European Court of Justice (ECJ) and the national courts of the Member States. The focus lies on the question which bodies are competent to refer such questions on points of EU law to the ECJ, aiming at an evaluation of whether the case law of the Court presents a too flexible approach towards the interpretation of what amounts to a 'court or tribunal' within the meaning of Article 267 TFEU. Consequently, the main reference is case law of the ECJ, but also opinions of Advocate Generals, a judge of the ECJ and legal academics will be taken into account. After a thorough analysis of the established case law of the ECJ, the conclusion can be drawn that the Court is very flexible in accepting references from various national bodies, even if they do not qualify as a court or tribunal within the respective national judicial system. The main reason for this flexibility is the need for a uniform application and interpretation of EU law throughout the whole Union which outweighs the resulting lack of legal certainty.

1. Introduction

The European Union represents an interplay between sovereign national states and a supranational organization. All actors involved bring their diverging, different interests and opinions into this interaction. The unwillingness of national states to surrender part of their – in some cases hard-earned – sovereignty to the Union displays one of the major problems. In addition, national courts sometimes dislike having rules dictated by an abstract, unfamiliar and superior body, although they would prefer to apply their own internal laws to a case at hand. Hereby, the risk is incumbent that the national courts take the interpretation of EU law in their own hand, which would undermine the effectiveness and uniform application of EU law. In order to prevent this danger, the preliminary reference procedure provides an important connective element between the national states on the one hand and the European Court of Justice (ECJ), representing the European Union, on the other hand.

However, only certain institutions at national level are allowed to refer a preliminary ruling to the Court of Justice. This paper aims at examining who is eligible to refer such a ruling to the ECJ. Ultimately, the question whether the Court has become too flexible in allowing too many actors and thus too many preliminary references will be answered. Consequently, the focus will be on the bodies referring preliminary rulings to the ECJ and on whether these requests were accepted by the Court or not.

It has often been argued that the Court of Justice accepts preliminary references too readily, and this proposition will be examined by taking into account primary and secondary legal sources, above all the case law of the ECJ on the admissibility of

preliminary references, but also the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as well as opinions of legal academics and scholars.

First of all, a definition of the preliminary reference procedure will be provided, followed by a detailed analysis of the ECJ's case law as well as opinions of Advocate Generals, a judge of the Court of Justice as well as various legal writers on the controversial issue whether the Court is too flexible in declaring references admissible. Lastly, a conclusion will summarise the main arguments and provide an answer to the above mentioned proposition.

2. The Preliminary Reference Procedure

2.1 Definition "preliminary reference procedure"

The preliminary reference procedure can be regarded as the main cooperation between the Court of Justice and the various courts of the Member States. Article 19 TEU demarcates the areas in which the Court of Justice has jurisdiction; paragraph 3 (a) provides that the ECJ shall give preliminary rulings on the interpretation of Union law or on the validity of acts adopted by EU institutions, upon the request of courts or tribunals of the Member States.

The preliminary reference procedure is further defined in Article 267 TFEU: National courts may, or in some cases must, request the ECJ to give a preliminary ruling on a point of EU law which in return enables the court to decide the dispute in national proceedings. The question may concern the interpretation of the Treaty as well as the validity and interpretation of acts of the institutions of the Union. A court or tribunal has the discretion to refer a question to the Court of Justice; not the parties to the proceedings, but the court itself decides whether to make a reference or not.¹ This discretion, however, falls away when there is no judicial remedy under national law against the decision of the court or tribunal of the Member State. In this case, the national court or tribunal must refer the question to the ECJ. The answer of the ECJ is not merely an opinion, but a judgment which binds not only the referring court, but also all other national authorities.² The authorities are obliged to amend the national law subsequently after the judgment in order to give full effect to individual rights under EU law.³ This procedure is praised as having given any European citizen the possibility to have EU rules clarified by which they are affected.⁴

More details can be found in Protocol (No 3) on the Statute of the Court of Justice of the European Union (Articles 23 and 23a), in the Rules of Procedure of the Court of

¹ C. Baudenbacher, *Concentration of Preliminary References at the ECJ or Transfer to the High Court/CFI: Some Remarks on Competition Law*, p. 269, available at http://www.ecln.net/elements/conferences/book_berlin/baudenbacher.pdf (last visited on April 21, 2011).

² Homepage of the Court of Justice of the European Union, Presentation of the Court of Justice, available at http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited on April 21, 2011); see also Case C-453/00 *Kühne & Heitz v Productschap voor Pluimvee en Eieren* [2004] ECR I-837.

³ Case C-231/06 *NPO v Jonkman* [2007] ECR I-5149.

⁴ Homepage of the Court of Justice of the European Union, Presentation of the Court of Justice, available at http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited on April 21, 2011).

Justice (in particular Chapter 9) and in the 2009 Information note on references from national courts for a preliminary ruling.⁵

The Treaty of Lisbon has introduced a new urgent preliminary procedure according to which the Court of Justice is required to act within a minimum of delay in case the proceedings before the national court or tribunal concern a person in custody.⁶

2.2. Who can refer preliminary rulings to the Court of Justice?

The first preliminary reference was made in 1961 and the numbers have been increasing steadily since.⁷ Article 19 TEU as well as Article 267 TFEU both mention 'any court and tribunal of a Member State'. However, what does this comprise? Which institutions are allowed to make a preliminary reference, when does the Court of Justice reject a request for a reference as inadmissible? And where does the body have to be located? In order to draw the contours of this classification, it is necessary to consider the case law of the ECJ as this is a question of EU law alone but the Treaties do not provide any definition.⁸

2.2.1 'Court or Tribunal' within the Meaning of Article 267 TFEU

The early case *Van Gend en Loos* already indicated that also administrative tribunals were accepted by the Court of Justice in addition to judicial bodies.⁹ Further cases have contributed to the ECJ's definition of a 'court or tribunal' for the purposes of Article 267 TFEU and it became clear that the Court takes account of a variety of factors.¹⁰

Even if the body is not regarded as a court or tribunal in its own jurisdiction, a reference may be accepted by the Court of Justice.¹¹ Conversely, the mere fact that its own jurisdiction considers the body as a court or tribunal does not automatically render it entitled to make a reference.¹²

The Court of Justice has established certain criteria for determining whether the body exercises a judicial function and is therefore qualified to make a reference, including in particular whether the body is established by law, is permanent, its jurisdiction is compulsory, applies rules of law, its procedure is *inter partes*, is independent, and is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

⁵ Homepage of the Court of Justice of the European Union, Procedure of the Court of Justice, available at http://curia.europa.eu/jcms/jcms/Jo2_7031/ (last visited on April 21, 2011).

⁶ Homepage of the Court of Justice of the European Union, Discussion documents, available at http://curia.europa.eu/jcms/jcms/P_69328/?hlText=preliminary (last visited on April 21, 2011).

⁷ H. Schepel, E. Blankenburg, 'Mobilizing the European Court of Justice', in G. de Búrca, J.H.H. Weiler (ed.), *The European Court of Justice*, (Oxford University Press, 2001), p. 30.

⁸ R. Barents, *Directory of EU Case Law on the Preliminary Ruling Procedure*, (Kluwer Law International, 2009), p. 51.

⁹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁰ The case law of the Court of Justice is available on <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>. Case law before June 17, 1996 is available on EUR-Lex (<http://eur-lex.europa.eu/en/index.htm>) (last visited on April 21, 2011).

¹¹ Case 61/65 *Vaassen-Göbbels* [1966] ECR 261; Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311; Case 14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 2545.

¹² Case 24/92 *Corbiau v Administration des Contributions* [1993] ECR I-1277.

These criteria appeared for the first time in the *Vaassen-Göbbels* case in 1966 and they were further consolidated in the *Dorsch Consult* judgment of 1997, the leading case in the definition of 'court or tribunal'.¹³ The criteria can be traced throughout the case law and are still valid today; e.g. they were used quite recently in the *Wilson* case in 2006.¹⁴ Each criterion was further defined and interpreted by the Court of Justice.

a. Established by law / permanence

There is not much discussion on these two requirements as they are not the final crucial factors in the determination of whether a referring body can be regarded as a court or tribunal in the sense of Article 267 TFEU.¹⁵

Regarding the first question, the national legislation serving as the basis for the establishment of the body in question is used by the Court as a proof that it is 'established by law'.¹⁶

b. Compulsory jurisdiction

This requirement includes two factors: First, the dispute can only be solved by recourse to the body in question.¹⁷ Secondly, the decision of the body has to be binding on the parties.¹⁸

c. Application of rules of law

This aspect is very little discussed in case law.¹⁹ A body fulfils this requirement for example by applying rules adopted by itself,²⁰ or general principles of fairness,²¹ provided that it also applies EU law.

d. Inter partes procedure

The prerequisite of proceedings inter partes is not an absolute criterion.²² It seems that the Court considers the fulfilment of this criterion as proof that the proceedings are of a judicial nature.²³ In the end, the national court decides whether there is a need to hear the defendant before making a reference.²⁴

¹³ Case 61/65 *Vaassen-Göbbels* [1966] ECR 261; Case 54/96 *Dorsch Consult* [1997] ECR I-4961.

¹⁴ Case 506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613, paragraph 48.

¹⁵ D.W.K. Anderson Q.C., M. Demetriou, *References to the European Court*, (Sweet & Maxwell, 2002), p. 32.

¹⁶ See Cases 110/98 and 147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 34; Case 416/96 *Nour Eddine El-Yassini* [1999] ECR I-1209, paragraph 18; Case 54/96 *Dorsch Consult* [1997] ECR I-4961, paragraphs 24-25.

¹⁷ See Case 54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 28; Cases 69/96 to 79/96 *Garofalo* [1997] ECR I-5603, paragraph 24; Cases 110/98 and 147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 35.

¹⁸ See Cases 110/98 and 147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 37; Case 54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 29.

¹⁹ D.W.K. Anderson Q.C., M. Demetriou, *References to the European Court*, (Sweet & Maxwell, 2002), p. 33.

²⁰ Case 54/96 *Dorsch Consult* [1997] ECR I-4961, paragraphs 32 and 33.

²¹ Case 393/92 *Almelo* [1994] ECR I-1477, paragraphs 22 to 24.

²² See Cases 110/98 and 147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 37.

²³ D.W.K. Anderson Q.C., M. Demetriou, *References to the European Court*, (Sweet & Maxwell, 2002), p. 33.

²⁴ See Cases 332/92, 333/92 and 335/92 *Eurico italia* [1994] ECR I-711, paragraph 11.

In case of *ex parte* proceedings, however, the national court is required to give a more detailed and complete report about the legal and factual situation of the case at hand.²⁵ Furthermore, it was held that it follows from Article 267 TFEU that a reference to the Court of Justice can be made only if there is a case pending before the national court.²⁶

e. Independence

Independence comprises two aspects: The external aspect includes that the body has to be protected against any external influence or pressure which may be likely to endanger the independent judgment of its members; the internal aspect focuses on impartiality and it requires objectivity and that the members have no personal interest in the outcome of proceedings.²⁷ The Court will take into consideration the composition of the body and the rules aimed at ensuring the independence and impartiality of its members.²⁸ The requirements of independence and impartiality have been further defined in cases like *Pretore di Salò v Persons Unknown*, *Pardini* and *De Coster*.²⁹

f. Proceedings leading to a decision of a judicial nature

Not only the type of body, but also the nature of the proceedings from which the reference originates is decisive for the admissibility of the preliminary reference. Even if the body is part of the national judiciary and has to be institutionally regarded as a court or tribunal, the Court has in some cases nevertheless decided that it cannot serve as a court or tribunal for the purpose of Article 267 TFEU because the proceedings do not lead to a decision of a judicial nature.³⁰

Moreover, it has to be determined in what particular capacity the body is acting within the specific legal context when requesting a ruling from the Court.³¹ When the referring body merely makes an administrative decision but does not solve a legal dispute, it cannot be considered as exercising a judicial function.³²

2.2.2 Application of the criteria

In order to clarify how the various criteria are applied by the Court of Justice in practice, several examples will be given in which the Court had to determine whether a body falls within the definition of 'court or tribunal' for the purpose of Article 267 TFEU.

²⁵ Case 266/96 *Corsica Ferries* [1998] ECR I-3949, paragraphs 23-24.

²⁶ See Case 210/06 *Cartesio*, Judgment of 16 December 2008, paragraph 56.

²⁷ See Case 109/07 *Pilato*, Order of 14 May 2008, paragraph 23.

²⁸ See Case 54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 36.

²⁹ Case 14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 2545, paragraph 7; Case 338/85 *Pardini* [1988] ECR 2041, paragraph 9; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 17.

³⁰ See Case 111/96 *Job Centre I* [1995] ECR I-3361; Case 134/97 *Victoria Film* [1998] ECR I-7023; Case 178/99 *Salzmann* [2001] ECR I-4421; Case 86/00 *HSB-Wohnbau GmbH* [2001] ECR I-5353; Case 447/00 *Holto Ltd* [2002] ECR I-735.

³¹ Case 192/98 *ANAS* [1999] ECR I-8583, paragraph 22.

³² Case 182/00 *Lutz* [2001] ECR I-547, paragraph 14.

In *Vaassen-Göbbels*, the Court of Justice received a reference from an arbitration tribunal and it determined that it can be considered as a court or tribunal because of two reasons: First, it was a government minister who held the power to nominate members as well as to approve the panel itself and changes in its rules. Secondly, the panel was a permanent body and operated under national law.³³

In *Broekmeulen v HRC*, the Appeal Committee of the Dutch Medical Professions Organization made a reference to the Court of Justice.³⁴ Also this reference was accepted due to the fact that the Dutch Public Authorities approved and assisted the Committee and they were considerably involved. In addition, the Committee conducted full legal proceedings before reaching a decision and the right to work under EU law was affected by its decisions. Lastly, the decisions were final and there was no possibility to appeal to Dutch Courts.

Other bodies which have been considered to satisfy the criteria of a national court or tribunal within the meaning of Article 267 TFEU include judges investigating in criminal matters³⁵; a council of state³⁶ and courts having special jurisdiction, for example the indictment divisions of courts of appeal in France³⁷, the Finnish Rural Business Appeals Board³⁸ and the Public Procurement Office of the Land Tyrol (Tiroler Landesvergabeamt).³⁹

The case *Borker* concerned a reference from the Paris Bar Association Council because a French lawyer was not allowed to appear before German courts.⁴⁰ This request was dismissed because no particular lawsuit was in progress and the Bar Council was therefore not acting as a court or tribunal which had the aim of giving a judgment of a judicial nature.

In *Nordsee v Nordstern*, a privately appointed arbitration body delivered binding decisions based on law, including EU law.⁴¹ The reasons for the rejection of its reference were the lack of involvement of national authorities and the lack of a sufficiently close link to national legal remedies.

In *Corbiau*, the reference of the office of the Director of Taxation was refused because it acted in both an administrative and judicial capacity and was not independent enough to be considered as a court or tribunal.⁴²

A national competition authority was held to be unable to make a reference in *Syfait* because it was strongly connected to the national executive and a government minister supervised the authority.⁴³ It was further unclear whether the members were in fact independent. Lastly, the EU Commission could deprive the authority of its power to hear particular cases due to EU competition law.

Bodies exercising jurisdictional and administrative functions are generally not allowed to make a reference to the Court of Justice, for example accounting offices like

³³ Case 61/65 *Vaassen-Göbbels* [1966] ECR 261.

³⁴ Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311.

³⁵ Case 105/03 *Pupino* [2005] ECR I-5285, paragraph 22.

³⁶ Cases 69/96 to 79/96 *Garofalo* [1997] ECR I-5603, paragraphs 26-27.

³⁷ Case 296/08 *Santesteban Goicoechea*, Judgment of 12 August 2008, paragraph 41.

³⁸ Cases 9/97 and 118/97 *Jokela* [1998] ECR I-6267, paragraphs 19-24.

³⁹ Case 103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraphs 17-18, 22-25.

⁴⁰ Case 138/80 *Borker* [1980] ECR 1975.

⁴¹ Case 102/81 *Nordsee Deutsche Hochseefischerei v Nordstern* [1982] ECR 1095.

⁴² Case 24/92 *Corbiau v Administration des Contributions* [1993] ECR I-1277.

⁴³ Case 53/03 *Syfait v GlaxoSmithKline* [2005] ECR I-4609.

the Court of Auditors (Corte dei Conti)⁴⁴ and courts exercising administrative functions like the Amtsgericht Heidelberg, Germany.⁴⁵ Bodies which are not regarded to be courts or tribunals include administrative appeal bodies⁴⁶ and the public prosecutor.⁴⁷

The case law of the Court of Justice does not present a precise definition of a 'court or tribunal' in the sense of Article 267 TFEU; however, it can be said that although the factors appear to be crucial at first glance, the Court does not base its decision solely on the fact whether the body is private or public or whether there is the possibility of an appeal against its decision. More pivotal is the degree of involvement of national authorities, the level of independence and impartiality as well as the nature of the proceedings and the decisions of the body.

2.2.3 Location of the Court

Article 267 TFEU further prescribes that the court or tribunal has to be 'of a Member State'. In unclear cases, the Court has interpreted its geographical jurisdiction in a reasonably generous way.⁴⁸

The Member States of the European Union are listed in Article 52 TEU and the territorial scope of the application of the Treaties is further defined in Article 355 TFEU. The Member States themselves decide on the extent of their territory.⁴⁹

Furthermore, the French overseas departments are considered to be an integral part of the French Republic⁵⁰ and references from the Territory of French Polynesia, one of the regions listed in Annex II regarding overseas countries and territories, are accepted by the Court.⁵¹

An example of a court comprising several countries instead of belonging to one national state only is the Benelux Court: The Court of Justice held that this Court, including judges from Belgium, the Netherlands and Luxembourg, is not only permitted but even obliged to make a reference.⁵² Moreover, it has been suggested that the possibility to make a reference should be extended to international courts as well.⁵³

In Opinion 1/91, the Court of Justice declared its willingness to accept preliminary references even from courts of non-Member States if those courts were in turn prepared to accept its ruling as binding.⁵⁴

⁴⁴ Case 440/98 RAI [1999] ECR I-8597, paragraphs 13-16.

⁴⁵ Case 86/00 HSB-Wohnbau GmbH [2001] ECR I-5353, paragraphs 11, 14, 15.

⁴⁶ Case 516/99 Schmid [2002] ECR I-4573, paragraphs 34-38.

⁴⁷ Cases 74/95 and 129/95 X [1996] ECR I-6609, paragraphs 18-19.

⁴⁸ D.W.K. Anderson Q.C., M. Demetriou, *References to the European Court*, (Sweet & Maxwell, 2002), p. 46.

⁴⁹ Case 148/77 Hansen v Hauptzollamt Flensburg [1978] ECR 1787, paragraph 10.

⁵⁰ Case 148/77 Hansen v Hauptzollamt Flensburg [1978] ECR 1787, paragraph 10; Case 163/90 Administration des Douanes et Droits Indirects v Legros [1992] ECR I-4625; Cases 363/93 and 407 to 411/93 Renè Lancry S.A. v Direction générale des douanes [1994] ECR I-3957.

⁵¹ Cases 100 and 101/89 Kaefer and Procacci v France [1990] ECR I-4647.

⁵² Case 337/95 Parfums Christian Dior v Evora [1997] ECR I-6013.

⁵³ H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, (Kluwer Law International, 2001), p. 268.

⁵⁴ Opinion 1/91 Re the Draft Treaty on a European Economic Area [1991] ECR I-6079.

2.3 Opinions about the Case Law of the ECJ

2.3.1 Pro Greater Flexibility

First of all, Koen Lenaerts, a current judge of the Court of Justice, stands up for the established case law of the Court and advocates that all courts or tribunals of the Member States should keep their right to refer a preliminary ruling to the ECJ at the earliest relevant moment in national proceedings involving issues of EU law.⁵⁵ He argues that litigants are thereby saved from the costs of lengthy proceedings when the point of EU law can be clarified by the ECJ in early stages of the proceedings.⁵⁶ He relies on case law of the ECJ as evidence that this is very likely to happen, both in cases concerning main principles of EU law and in those of a more technical character.⁵⁷

Another major argument, probably forming the basic justification for the Court's flexibility, is the strong need for a uniform interpretation of EU law, so that all national courts and tribunals should retain the right to refer questions to the ECJ.⁵⁸ Otherwise, leaving the national courts without guidance might result in different interpretations in each of the currently 27 Member States.

A further argument in favour of greater flexibility is that by restricting the procedure for preliminary rulings, its effectiveness as an indirect controlling instrument for the compliance of Member States with their Union obligations will be weakened.⁵⁹

In addition, it is argued that the principle of mutual cooperation between the Court of Justice and the national courts, which is *inter alia* instrumental for the functioning of the internal market, is seen as an impediment for a system of filtering preliminary references.⁶⁰

Furthermore, the opinion was raised that limiting the ability to refer would result in cases being fought to the peak of the national judicial system only for receiving the opportunity to make a reference to the ECJ.⁶¹ The possibility that any court or tribunal may make a reference can therefore be seen as a safeguard against the court of final instance being reluctant to refer.⁶² In addition, the fact that any court is allowed to refer stresses the fact that individuals can rely on directly effective Union rights at any point in the national legal system.⁶³

⁵⁵ K. Lenaerts, *The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited*, p. 239, available at http://www.ecln.net/elements/conferences/book_berlin/lenaerts.pdf (last visited on April 21, 2011).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 135.

⁵⁹ A. Adinolei, 'New Modalities for the Preliminary References Procedure: The Amsterdam Treaty and the Conventions among Member States', in AEL Vol. VIII Book 1, *European Community Law*, (Kluwer Law International, 2001), p. 89.

⁶⁰ Document 'The Future of the Judicial System of the European Union (Proposals and Reflections) (The Courts' Paper)', in A. Dashwood, A. Johnston (ed.), *The Future of the Judicial System of the European Union*, (Hart Publishing, 2001), p. 138.

⁶¹ P. Craig, G. de Búrca, *EU Law: Text, Cases and Materials*, (Oxford University Press, 2008), p. 496.

⁶² *Ibid.*

⁶³ *Ibid.*

Another position prefers a reform of the Article 267 TFEU procedure which is directed at making the system more efficient rather than discouraging the use of the procedure in general.⁶⁴

2.3.2 Contra Greater Flexibility

In the context of the admissibility of preliminary references and the scope of the definition of 'court and tribunal', the opinion of Advocate General Ruiz-Jarabo Colomer in Case François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort is very interesting and significant: He complains that the existing case law of the Court of Justice is too flexible and inconsistent, resulting in a lack of legal certainty.⁶⁵ Furthermore, he criticises the absence of any clear definition and the focus on the facts of individual cases.⁶⁶ He further elaborates on the gradual relaxation of the requirement of the body's independence,⁶⁷ on the decreasing importance of inter partes proceedings,⁶⁸ on the confusion resulting from the criterion that the decision be of a judicial nature,⁶⁹ and on the inconsistency in the handling of arbitrators.⁷⁰ Generally, he pleads for an urgent reform of the case law by adopting a simpler and more restrictive view on the scope of admissibility:

As a general rule, references for preliminary rulings may be made only by judicial bodies in proceedings in which they must settle a dispute by exercising their power of adjudication. By way of exception, references from other bodies are admissible only where no further legal remedy can be pursued and provided that safeguards of independence and adversarial procedure are available.⁷¹

The Court of Justice, however, did not take the Advocate General's opinion into consideration and decided the case according to its established case law.⁷²

It was argued that the denial of the Advocate General's opinion has to be seen in the light of possible harmful effects in decreasing the possibility to make a reference, namely that the national court would have to decide on the point of EU law itself without any instruction from the ECJ, a result which is likely to jeopardise the uniformity of the law.⁷³ In addition, it is not predictable that the consequences of accepting references from a wider range of bodies are as detrimental as proposed by Advocate General Colomer.⁷⁴

⁶⁴ Dr. R. Lane, 'Article 234: A Few Rough Edges Still', in M. Hoskins *et al* (ed.), *A true European: Essays for Judge David Edward*, (Hart Publishing, 2004), p. 329.

⁶⁵ Case 17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, Opinion of June 28, 2001, paragraph 14.

⁶⁶ Opinion, paragraphs 58-60.

⁶⁷ Opinion, paragraphs 19-28.

⁶⁸ Opinion, paragraphs 29-38.

⁶⁹ Opinion, paragraphs 39-47.

⁷⁰ Opinion, paragraphs 48-52.

⁷¹ Opinion, paragraph 95.

⁷² K. Lenaerts, *The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited*, p. 230, available at http://www.ecln.net/elements/conferences/book_berlin/lenaerts.pdf (last visited on April 21, 2011).

⁷³ Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 1 *Common Market Law Review* 40 (2003) 9-50.

⁷⁴ D.W.K. Anderson Q.C., M. Demetriou, *References to the European Court*, (Sweet & Maxwell, 2002), p. 37.

An overall definition of 'court or tribunal' is hindered by the variety of national decision-making bodies and procedures and it seems that the Court puts more weight on the need for flexibility than on the advantages of legal certainty.⁷⁵

Yet Advocate General Colomer is not alone with his opinion: In the case *Wiener SI*, Advocate General Jacobs predicted that the future result will be that the Court has to rule in any case in which a point of EU law is involved in any court or tribunal in any Member State.⁷⁶ Consequently, the Court would collapse under its workload.⁷⁷ He therefore regarded greater self-restraint on the part of both national courts and the Court of Justice as the only possible solution.⁷⁸

An additional advantage proposed by academics is that a system of filtering the references would offer a solution to the problem of the Court's unmanageable workload.⁷⁹ In addition, this would lead to the national courts being encouraged to be more selective in which questions to refer, which would again decrease the number of cases referred to the Court of Justice.⁸⁰

Lastly, the view was advanced that it is the task of the Member States to reconsider the existing judicial structure in order to support the Court of Justice in reaching its aim, namely the protection of the rule of law.⁸¹

3. Conclusion

A thorough analysis of the case law of the Court of Justice reveals that the Court has gradually expanded the scope of bodies being allowed to make a reference which would be considered administrative or regulatory institutions rather than courts under national law. The ECJ accepts references from any body irrespective of national precedents or hierarchies. The resulting relation between the ECJ and the national courts is therefore far from clear and marked by a lack of hierarchy and certainty. This fact is even reinforced by the fact that a consistent Union definition of 'court or tribunal' is absent.

Instead, the Court has developed various criteria according to which it decides whether a reference is admissible or not. It remains to be seen, however, whether these criteria will be applied strictly in all future cases; if the Court of Justice denies jurisdiction, the national body is left without guidance in the interpretation of EU law. This consequence is not desirable from a Union point of view and it is one of the strongest arguments in favour of a flexible interpretation of 'court or tribunal' within the meaning of Article 267 TFEU. Another argument is that the compliance of the Member States with Union obligations can be monitored by the preliminary ruling procedure; this effective controlling instrument would be undermined by restricting the possibility to make a reference.

⁷⁵ Case E-194 *Ravintolitsijain*, Judgment of 16 December, 1994, paragraph 9.

⁷⁶ Case 338/95 *Wiener SI* [1997] ECR I-6495, Opinion of 10 July 1997, paragraph 15.

⁷⁷ Opinion, paragraph 15.

⁷⁸ Opinion, paragraph 18.

⁷⁹ Document 'The Future of the Judicial System of the European Union (Proposals and Reflections) (The Courts' Paper)', in A. Dashwood, A. Johnston (ed.), *The Future of the Judicial System of the European Union*, (Hart Publishing, 2001), p. 138.

⁸⁰ *Ibid.*

⁸¹ J. Komárek, 'Federal Elements in the Community Legal System: Building Coherence in the Community Legal Order', 1 *Common Market Law Review* 42 (2005), 9-34.

On the other hand, main arguments against greater flexibility of the Court accepting references from national courts are the resulting lack of legal certainty, particularly created by a relaxation of the importance and significance of the various criteria, and the reduction of the impracticable workload of the Court of Justice.

To conclude, the proposition made in the introduction of this paper has proved to be correct: The Court is very flexible in its interpretation of what amounts to a 'court or tribunal' in the sense of Article 267 TFEU. However, this fact does not necessarily have to be a negative development. Even though the case law appears to be somewhat inconsistent and provides the basis for many discussions, one must keep in mind that the Court is genuinely attempting to make the preliminary ruling procedure available to all bodies dealing with questions of EU law.

In my view, the preliminary reference procedure has to be kept flexible, not least because the increasing number of Member States results in an ever stronger need for the securing of the uniform application and interpretation of EU law throughout the whole Union. In this context, we should remember the major purposes of this procedure: it is crucial for the development of EU law in national courts and for the preservation of the unity of EU law; it is the main instrument for judicial review of EU institutions through individuals who challenge an EU measure before national courts and it relieves national courts when they have to solve cases involving EU law. In the light of these central aims, the flexibility shown by the Court of Justice becomes understandable. As EU law forms the basis of the proper functioning of the European Union, the need for uniformity in its application certainly outweighs the need for legal certainty. It is not difficult to imagine the result if every national court could interpret EU law as it pleases: The whole sense and foundation of EU law would be lost because the final result of diverging national interpretations would be nothing else than 27 different laws – with EU law merely providing the framework, but not a mandatory format.

Additionally, the argument that a more restricted scope of admissibility would lead to a reduction of the Court's workload is for me not convincing; instead, this problem should be solved by other means, but certainly not by refusing national courts the possibility to seek clarification of points of EU law, where the ECJ is the only competent institution to rule on such questions.

Thus, national bodies need and even should seek the guidance of the Court of Justice; therefore as many bodies as possible should have the possibility to make a reference to the ECJ.

EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS – IS THERE A NEED?

Karen Hammerschmidt-Freire

Abstract: The topic of this paper is the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. The problem resulting from this topic is whether there is a need for the European Union to accede to the Convention or not. In order to get acquainted with the topic, some background information about the European Convention on Human Rights and the European Union will be provided at the beginning of this paper. The main analysis consists of the presentation of arguments from primary sources, EU officials and legal authors which or who are either opposing or approving the accession of the Union to the ECHR. Based on a thorough analysis of the arguments, the conclusion can be drawn that the European Union should accede to the European Convention on Human Rights, since many advantages could be gained therefrom.

1. Introduction

This paper involves the current debate on the European Union's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms, also referred to as the European Convention on Human Rights (ECHR). The issue of accession has been discussed for a long time by the EU institutions, its Member States and the Council of Europe, but has not been fruitful yet. However, since the entry into force of the Treaty on the Functioning of the European Union, art. 6 (2) TEU constitutes the legal basis making EU accession possible. This legal basis is supplemented by the Protocol relating to Article 6 (2) TEU on the Accession of the Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. EU Accession to the ECHR is a controversial issue, given that becoming a Contracting Party to the Convention used to be possible only for the 47 Member States of the Council of Europe in the first place. Naturally, opinions are split: some are arguing in favour of accession, others oppose it vehemently. This paper intends to find an answer to the question whether there is a need for the European Union to accede to the European Convention on Human Rights.

The analysis will be based on the above-mentioned primary sources, such as art. 6 (2) TEU and the Protocol relating to it, but it will also take into account art. 59 (2) of the ECHR. The arguments either for or against accession are based on opinions from academics and on information from Union officials, such as press releases of joint talks between the Council of Europe and the Commission, as well a speech delivered by Viviane Reding, the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship. In order to provide a thorough understanding of the issue, general background information on the European Convention on Human Rights and the European Union will be given first. This information will contain the relation between the European Court of Justice and the European Court of Human Rights on the

one hand, and the EU's approach towards human rights protection on the other hand. Furthermore, the legal provisions for accession and the position in the past, as well as the current one, towards accession will be presented. The possible ratification process of the accession agreement will be explained, too. The main stress of the analysis will be laid on the presentation of the arguments in favour or against accession. Finally, a conclusion will be drawn based on those arguments, in order to answer the research question.

2. *The Legal Discussion of EU Accession to the European Convention on Human Rights*

2.1 The Legal and Historical Background of EU Accession to the European Convention on Human Rights

2.1.1 The Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 by the Council of Europe and entered into force in 1953.¹ Its main goal is to promote and uphold fundamental civil such as political rights and freedoms.² Its judicial body, the European Court of Human Rights (ECtHR) was established in Strasbourg, in order to enforce those rights.³

2.1.2 The relationship between the European Court of Justice and the European Court of Human Rights

The European Union's highest court is the Court of Justice (ECJ), which is located in Luxembourg.⁴ The ECtHR cannot adjudicate upon Union acts, since no link can be established between EU acts and the obligations under the ECHR.⁵ Nevertheless, EU Members States are obliged to adhere to and to respect the ECHR when applying and implementing EU law.⁶ The Luxembourg and the Strasbourg court try to work in cooperation.⁷ The judges of the courts are in close contact to each other and exchange vital information on matters, which are of concern to both of them.⁸ The ECtHR regards

¹ Council of Europe, A Convention to protect your Rights and Liberties, available at <http://human-rights-convention.org/>, last visited December 8, 2010.

² Council of Europe, EU accession to the European Convention on Human Rights, available at http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp, last visited December 8, 2010.

³ Ibid.

⁴ Europa, European Union Institutions and other bodies, The Court of Justice, available at http://europa.eu/institutions/instit/justice/index_en.htm, last visited December 8, 2010.

⁵ Council of Europe, EU accession to the European Convention on Human Rights, available at http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp, last visited December 8, 2010.

⁶ Council of Europe, EU accession to the European Convention on Human Rights, available at http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp, last visited December 8, 2010.

⁷ J. Juncker, Council of Europe- European Union: A sole Ambition for the European Continent (2006), 9, available at http://www.coe.int/t/der/eu_EN.asp, last visited December 8, 2010.

⁸ Ibid.

the protection of fundamental rights within the Union as equivalent to that under the Convention and the Court of Justice follows the case-law of the ECtHR.⁹

2.1.3 The Protection of Fundamental Rights within the European Union

The EU itself has adopted its own Charter of Fundamental Rights, which was signed on 7 December 2000 by the European Parliament, the Council and the Commission in Nice.¹⁰ It lays down the civil, political and social rights of EU citizens and residents.¹¹ With the entry into force of the Treaty on the Functioning of the European Union on 1 December 2009, the Charter gained legal effect and has obtained the same value as the Treaties.¹²

Fundamental rights are protected by the EU as general principles.¹³ Article 6 (3) TFEU reads that:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

Those general principles of EU law include rights that are protected under international treaties to which Member States are parties.¹⁴ In 1986, the ECJ held that the ECHR had pre-eminence to those general principles and since a ruling in 1996, the Court of Justice makes references to the ECtHR’s case law and takes into account the judgments of the ECtHR.”¹⁵

2.1.4 The Legal Provisions for EU accession to the European Convention on Human Rights

With the entry into force of the Treaty of Lisbon, the Union attained legal personality, which constitutes a precondition for EU accession to the ECHR.¹⁶

The legal basis for a possible accession of the EU to the ECHR can be found in art. 6 (2) TFEU:

⁹ Ibid.

Case C-84/95 Bosphorus {1996} ECR I-3953.

¹⁰ European Parliament, The Charter of Fundamental Rights of the European Union, available at http://www.europarl.europa.eu/charter/default_en.htm, last visited December 8, 2010.

¹¹ Bignami, ‘Creating European Rights: National Values and Supranational Interests’, 11 Columbia Journal of European Law 2 (2004-2005), 331.

¹² Europa, The Treaty of Lisbon, The Treaty at a glance, available at http://europa.eu/lisbon_treaty/glance/index_en.htm, last visited December 8, 2010.

¹³ Peers, ‘Bosphorus European Court of Human Rights: Limited Responsibility of European Union Member States for actions within the scope of Community Law’, 2 European Constitutional Law Review 3 (2006), 443.

¹⁴ Ibid.

¹⁵ Ibid., 443-444.

¹⁶ European Parliament, Accession to the European Convention, available at <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=137&pageRank=3&language=EN>, last visited December 8, 2010.

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”

A Protocol was annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union supplementing art. 6(2) TEU. It provides more extensive information, as well as particular guidelines for the accession of the Union to the Convention.

With the entry into force of Protocol 14 on 10 June 2010, a provision allowing for the European Union’s accession to the ECHR was added to the Convention itself.¹⁷ Article 59 (2) ECHR, dealing with the signature and ratification process of the Convention, was amended by Art. 17 of the Protocol. It now includes the wording ‘the Union may accede to the Convention’.¹⁸

2.1.5 The Historical Background of EU accession to the European Convention on Human Rights

Already since 1979, has the accession of the European Union to the ECHR been favored by the Commission.¹⁹ The European Parliament has also been requesting accession for a long time and even the majority of the Member States approve it.²⁰ However, an ECJ ruling in the past and the Amsterdam Treaty were in accord with each other that the EU lacked competence to accede the ECHR.²¹ Nevertheless, the fear existed that two instruments securing the protection of fundamental rights in Europe at the same time would collide at some point.²² During a meeting in 2005, the members of the Council of Europe emphasized the need of EU accession to the Convention without further delay.²³

2.1.6 The current situation on EU accession to the European Convention on Human Rights

The debate whether accession is desired or not, was reopened on 17 March 2010 with the Commission’s proposal to negotiate accession.²⁴ On 4 June 2010, the EU Justice Minister endowed the Commission with the mandate to conduct the Negotiation Process of

¹⁷ Council of Europe, Reform of European Court of Human Rights: Protocol No.14 enters into force, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR437%282010%29&Language=lanEnglish&Ver=original&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>, last visited December 8, 2010.

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 59 (2).

¹⁹ Alston et al., ‘An Ever Closer Union in Need of a Human Rights Policy: The European Union and Human Rights’, in P. Alston (ed.), *The EU and Human Rights*, (Oxford University Press, 1999), 4.

²⁰ S. Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, (Nomos Verlagsgesellschaft Baden-Baden, 1999), 37-38.

²¹ Sciarra, ‘From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy’, in Alston, *The EU and Human Rights*, 499.

²² Ibid.

²³ J. Juncker, Council of Europe- European Union: A sole Ambition for the European Continent (2006), 7, available at http://www.coe.int/t/der/eu_EN.asp, last visited December 8, 2010.

²⁴ Council of Europe, EU accession to the European Convention on Human Rights, available at http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp, last visited December 8, 2010.

accession.²⁵ On 26 May 2010, the steering committee for Human Rights of the Council of Europe was assigned an *ad hoc* mandate to cooperate with the EU and to decide which legal instrument would be suitable for the accession.²⁶

2.1.7 The Ratification Process for EU accession

The final agreement has to be concluded by the Committee of Ministers of the Council of Europe and by the Council of the EU with a unanimity vote.²⁷ Additionally, the national parliaments of the Member States and the European Parliament have to give their consent to it.²⁸ Finally, the 47 Contracting Parties to the ECHR would have to ratify this agreement.²⁹

2.2 The Advantages and Disadvantages of EU Accession to the European Convention on Human Rights

As already discussed above, the EP, the Commission, most of the Member States and the Council of Europe are in favor of EU accession to the ECHR. Therefore, one might wonder why this step has not yet been taken and why it has been abandoned after 1979 in the first place? The issue has to be considered carefully and both its advantages and disadvantages have to be weighed and taken into account. Of course, there are many arguments in favor of accession, but also others opposing it, arguing that accession is not required.

2.2.1 The Arguments Opposing EU accession to the European Convention on Human Rights

Many critics claim that there is no need for accession in the first place, since the ECHR has achieved a *jus cogens* status, which makes the protection of human rights and fundamental freedoms a binding customary rule.³⁰ This would mean that the EU would be bound to the ECHR by customary law anyhow, hence accession would not be needed.³¹ However, the *jus cogens* status only covers the minimum standard of human rights and it cannot live up to the vast standard of fundamental freedoms and rights protected by the ECHR.³²

²⁵ Ibid.

²⁶ Ibid.

²⁷ Council of Europe, European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights (Press Release), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR545%282010%29&Language=lanEnglish&Ver=original&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>, last visited December 8, 2010.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Winkler, Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention, 30.

³¹ Ibid.

³² Winkler, Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention, 30.

Others argue that the accession would require a lot of administrative work and organization, in order to coordinate the negotiation.³³ This argument, however, does not seem to be very convincing, since its critics stress at the same time the importance of the accession.³⁴ Consequently, if EU accession is indeed of such significance, one should not be deterred from the administrative work. Setting up an accession agreement will certainly be a complex process, but if this step is necessary and beneficial for the European Union and the promotion of fundamental rights it should be taken without hesitation.

Another fear is the major constitutional change to the Treaties, which might result from the accession, since the existing body of law would have to be modified and it would be very difficult to integrate all provisions and obligations of the ECHR.³⁵ This fear could be waned with a compromise in the accession agreement.³⁶ This compromise could either permit the EU not to fulfill all the obligations under the ECHR or it could provide for modifications of some provisions of the ECHR, whereas the former proposal would presumably be easier to realize.³⁷ Aside from that, art. 1 of the Protocol relating to Article 6(2) TEU on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms stipulates that the characteristics of the European Union and its law should be preserved.

Two issues against the accession have been raised in the past, but they have lost its significance these days. The first issue concerned the introduction of an own fundamental rights Charter before being able to accede to the ECHR.³⁸ Since the EU's Charter of Fundamental Rights was already signed in 2000 and gained legal effect in 2009, this is of no concern anymore.³⁹ Another presupposition relating to the Charter was, that it would have to guarantee that the protection of fundamental rights was of a higher or equivalent standard as the ECHR's.⁴⁰ This has been confirmed by the ECtHR in the *Bosphorus* Case. The ECtHR held in this case that the Contracting Parties to the ECHR may transfer their sovereign powers to international organizations.⁴¹ If equivalence in the protection of fundamental rights between the international organization and the ECHR can be established, a State is regarded as not having departed from its obligations under the Convention while implementing duties under an international treaty.⁴² The EU is seen as an organization protecting fundamental rights in an equivalent manner to the ECHR, the only exception being a manifestly deficient measure based on EU law.⁴³

³³ Ibid., 36.

³⁴ Ibid.

³⁵ Weiler et al, 'A Human Rights Policy for the European Community and Union: The Question of Competences', in Alston, *The EU and Human Rights*, 149-150.

³⁶ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

³⁷ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

³⁸ Weiler et al, 'Accession of the Communities to the European Convention on Human Rights: Commission Memorandum', 42 *Modern Law Review* 6 (1979), 686.

³⁹ Europa, *The Treaty of Lisbon, The Treaty at a glance*, available at http://europa.eu/lisbon_treaty/glance/index_en.htm, last visited December 2010.

⁴⁰ Ibid.

⁴¹ Case C-84/95 *Bosphorus* {1996} ECR I-3953.

Peers, 2 *European Constitutional Law Review* 3 (2006), 448.

⁴² Ibid., 449.

⁴³ Peers, 2 *European Constitutional Law Review* 3 (2006), 449.

The second issue which was of importance in the past dealt with the fact that the ECHR itself was rather directed towards states.⁴⁴ However, in June 2010, a specific provision was added by Protocol 14 to the ECHR, which allows for EU accession to the Convention.⁴⁵

A concern which is still of importance today, is the potential change of an individual Member State's situation.⁴⁶ This argument relates to the fact, that some Protocols of the Convention have not been ratified by all Member States.⁴⁷ It was acknowledged that the accession of the EU to the ECHR including all of its Protocols would be very desirable, since those protocols might be relevant regarding the Union's power.⁴⁸ A two stage approach was proposed to solve this issue: At first, the EU should be entitled to accede to any Protocol and at a later stage it should be decided to which particular Protocol it will definitely accede.⁴⁹ However, Article 2 of the Protocol relating to Article 6 (2) TEU on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms explicitly requires that the situation of an individual Member State should not be affected anyway.

The strongest argument of those opposing accession is the one of autonomous interpretation of Union law. The Principle of autonomy of EU law was established in the *Fotofrost* Case, which grants the ECJ the exclusive competence to review EU legislation.⁵⁰ After accession, this exclusive competence would no longer exist, since the ECtHR would be entitled to review Union law.⁵¹ This issue might be solved with entitling the Union to the right of becoming a co-defendant.⁵² The Union could thereby join proceedings by or against a Member State in any case.⁵³ This solution would not modify the ECHR's procedural or technical aspects, but it would constitute a significant instrument to ensure the insertion of the EU to the ECHR.⁵⁴

One could also start arguing from a different angle: Instead of deeming the new approach of legislative review of EU law by the ECtHR as a breach of the principle of autonomy, one could rather consider it as being very beneficial. The judicial review by the ECtHR might work as a significant safeguard for the EU's own fundamental rights Charter in cases where the EU has acted wrongly and failed to implement the protection of human rights correctly.⁵⁵

As can be seen, many of the contra arguments can be rebutted with possible compromises or a different way of reasoning. Therefore, now after having addressed the arguments opposing the accession of the EU to the ECHR, the numerous advantages of such an accession will be highlighted.

⁴⁴ Weiler et al, 42 *Modern Law Review* 6 (1979), 690.

⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 59 (2).

⁴⁶ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Case 314/85 *Firma Fotofrost v Hauptzollamt Lübeck - Ost* {1987} ECR 4199.

⁵¹ Adjudicating Europe, Accession to ECHR, Article 267 TFEU and the role of national courts, available at <http://adjudicatingeurope.eu/?p=461>, last visited December 8, 2010.

⁵² V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ D. Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), 259.

2.2.2 The Arguments in Favor of EU accession to the European Convention on Human Rights

Firstly, it has been criticized for a long time that the ECJ's scrutiny is not sufficiently strict and that too much discretion is left to the EU institutions.⁵⁶ This would be avoided with the accession to the ECHR, since EU acts would be subject to review by an external control- the ECtHR.⁵⁷ This would foster the protection of human rights throughout Europe and would legitimate the whole body of EU law and fundamental rights.⁵⁸

The EU submitting itself to the control of the ECtHR and the ECHR will also increase the commitment to human rights.⁵⁹ The Union's competences would expand into other fields, which are not solely of economic or political purpose anymore.⁶⁰ Fundamental rights would be employed in areas in which they are mostly needed, such as in fields of immigration or cooperation in judicial matters.⁶¹ Thus, due to the accession, the Union would engage outside its typical areas. The human rights protection within the EU would be strengthened and the EU would play an important role in the area of human rights.⁶²

The ECHR is the core of the European human rights system, but it has also gained significance outside the realm of Europe, since its case law serves as a basis for other courts, such as the Inter-American Court of Human Rights.⁶³ Thus, with its commitment to the protection of fundamental rights and democracy under the ECHR, the EU would boost its reputation as a legal entity and its political image would increase on an international level.⁶⁴ In addition to that, future EU accessions to other international institutions or organizations might also be promoted.⁶⁵

The accession would also narrow down differences between numerous European states within the area of fundamental rights.⁶⁶ Consequently, closer integration in Europe would be promoted.⁶⁷ With the accession all states would be unified as one Contracting Party under the ECHR.⁶⁸

The EU would be at equal footing with its Member States, as it will be supervised by the ECtHR and it will be represented by an EU judge in the ECtHR.⁶⁹ This would mean that the EU could bring one of the Member States before court and the Member

⁵⁶ Von Bogandy, 'The European Union as a human rights organization? Human Rights and the core of the European Union', 37 *Common Market Law Review* 6 (2000), 1320.

⁵⁷ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 40.

⁵⁸ *Ibid.*

⁵⁹ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

⁶⁰ Chalmers, *European Union Public Law*, 259.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 43.

⁶⁴ Weiler et al, 42 *Modern Law Review* 6 (1979), 684.

⁶⁵ *Ibid.*

⁶⁶ Blackburn et al, *Fundamental Rights in Europe: The ECHR and its Member States 1950-2000*, (Oxford University Press, 2001), 96.

⁶⁷ *Ibid.*

⁶⁸ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 40.

⁶⁹ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

States could do the same with the Union. Therefore, the accession would lead to more coherence, since Europe would be unified regarding its law and common values.⁷⁰

The fact that the EU will be at an equal level with the other Contracting Parties will also lead to a change in the ECtHR's reasoning.⁷¹ It would no longer have to differentiate between two distinct international commitments, the ECHR and the EU, since the EU would have the same obligations as any other Contracting Party.⁷² The gap of conflicting duties of Member States under EU law and under the ECHR would finally be closed and the issue of dealing with the supremacy of EU law in cases brought before the ECtHR would be solved as well.⁷³ This would ensure the consistency of the protection of fundamental rights within Europe.⁷⁴

In addition, there would not be any more gaps regarding the legal protection of Union citizens.⁷⁵ If the Union acceded to the ECHR, EU citizens would be entitled to the same protection by the Union and by the Member States.⁷⁶ Moreover, citizens claiming to be a victim of a violation of any fundamental rights provided in the ECHR by an act or omission of a EU institution could file a complaint against the EU.⁷⁷ This would constitute a great advantage for private parties for whom it is very difficult to fulfill the *locus standi* requirements before the Court of Justice, in order to bring a claim against an act of the European Union. The ECHR, however, allows under art. 34 and 35 for actions brought by individuals or non-governmental organizations, after having exhausted all national remedies.

Accession to the ECHR would serve the citizens in another important aspect, as it would bring more legal certainty.⁷⁸ It has been claimed that the ECJ's jurisdiction is very abstract.⁷⁹ The public is not able to see and understand the ECJ's way of reasoning and of protecting fundamental rights, due to the complexity of EU law, which has been criticized by academics.⁸⁰

Another argument brought in favor is the fact, that the accession would complete the Union's system of the protection of fundamental rights.⁸¹ The European Union's fundamental rights policy consists of four components.⁸² Firstly, there has to be a legally binding Charter of Fundamental Rights, which has already been adopted in December 2009 with the entry into force of the Treaty on the Functioning of the European Union.⁸³

⁷⁰ Ibid.

⁷¹ Chalmers, European Union Public Law, 261-262.

⁷² Chalmers, European Union Public Law, 261-262.

⁷³ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 40.

⁷⁴ J. Juncker, Council of Europe- European Union: A sole Ambition for the European Continent (2006), 7, available at http://www.coe.int/t/der/eu_EN.asp, last visited December 8, 2010.

⁷⁵ Council of Europe, EU accession to the European Convention on Human Rights, available at http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp, last visited December 8, 2010.

⁷⁶ Ibid.

⁷⁷ Council of Europe, European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights (Press Release), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR545%282010%29&Language=lanEnglish&Ver=original&BackColorIntranet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>, last visited December 8, 2010.

⁷⁸ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 39.

⁷⁹ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 39.

⁸⁰ Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 39.

⁸¹ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

⁸² Ibid.

⁸³ Europa, The Treaty of Lisbon, The Treaty at a glance, available at http://europa.eu/lisbon_treaty/glance/index_en.htm, last visited December 8, 2010.

Secondly, fundamental rights have to be promoted.⁸⁴ This is one of the main objectives of the Stockholm program setting guidelines for the development of an area of freedom, security and justice in Europe.⁸⁵ Thirdly, fundamental rights have to be strengthened which was done with the creation of the portfolio relating to Justice, Fundamental Rights and Citizenship.⁸⁶ Finally, the EU has to accede to the ECHR.⁸⁷ Therefore, the Union's accession would finalize the EU's fundamental rights policy.

As one can see already, the arguments in favor of EU accession to the ECHR outweigh the ones opposing accession. Accession would not only serve the European Union, but it would also be beneficial to the EU citizens and to Europe as a more integrated area itself.

3. Conclusion

Given the arguments presented in the analysis of this paper, there is certainly a need for the EU to accede to the ECHR, since many advantages would come along with such an accession.

Firstly, the Union would complete its human rights policy. Secondly, the external control of the European Court of Human Rights would serve as an important safeguard to check whether the Union has succeeded in implementing its fundamental rights system or whether it has failed to do so in particular fields. Moreover, the accession would lead to an expansion of the Union's competences, from economic and political areas to social ones. This would promote and uphold the fundamental rights protection throughout the Union and the Union would achieve, at the same time, an even more respectable position in world politics. Finally, accession would promote integration on the continent of Europe, but also within the Union itself. Integration in Europe would be achieved, since the differences between European states and their systems for the protection of fundamental rights would be narrowed down and replaced with common norms. Integration within the Union would be procured by the EU placing itself at the same level as all the other Member States and Contracting Parties. The Union would, thus, have the same rights as the Member States. Finally, EU accession to the ECHR would bring more consistency regarding the protection of fundamental rights throughout the European continent.

The arguments opposing accession, on the contrary, are almost all flawed, weak or obsolete. The fears reflected in them, e.g. the major constitutional change to the Treaties or the change of an individual Member State's situation will not occur in any event, since those aspects have already been taken into account and many solutions to those problems have already been presented during the negotiation process.

The Protocol relating to Article 6 (2) TEU on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, e.g. requires the preservation of the specific characteristics of the Treaties and the Union which is why EU law will not be changed in a major way with the accession to the

⁸⁴ V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe' (Speech), March 18, 2010.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

ECHR. Article 2 of the Protocol, explicitly provides for the situation of individual Member States. It prescribes that their situation shall not be affected by accession.

To conclude, one can say that the arguments in favor of accession are stronger and more significant than those against it. With the accession to the ECHR many advantages would be created. Not only the Union would profit from it in numerous aspects, but also the EU citizens themselves would receive enhanced rights, since they would be entitled to bring directly complaints against the EU before the ECtHR.



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